TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 102 147.

GEORGE F. EMBLEN, APPELLANT,

vs.

THE LINCOLN LAND COMPANY, GEORGE F. WEED, IDA B. WEED, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED AUGUST 25, 1900.

(17,888.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

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GEORGE F. EMBLEN, APPELLANT,

vs.

THE LINCOLN LAND COMPANY, GEORGE F. WEED, IDA B. WEED, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 25, 1901.

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, 1899, of said court, begun and held at the United States court-house, in the city of St. Louis, Missouri, on the first Monday in December, to wit, the fourth day of December, A. D. 1899, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

{Seal United States Circuit Court of Appeals, Eighth Circuit.}

Attest: JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the fourth day of September, A. D. 1899, a transcript of record, in pursuance of an appeal allowed by the circuit court of the United States for the district of Nebraska, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in a cause wherein George F. Emblen was appellant and The Lincoln Land Company *et al.* were appellees; which said transcript of record is in the words and figures following, to wit:

1 Pleas before the Honorable Oliver P. Shiras, judge of the district court of the United States for the northern district of Iowa and assigned to and sit-ing in the circuit court of the United States for the district of Nebraska, within the eighth judicial circuit, at the May, 1899, term thereof.

Be it remembered, that on the 15th day of December, 1897, bill was filed in the clerk's office of said circuit court.

Thereupon afterwards, to wit: on the 7th day of February, 1898, alias chancery subpœna was issued in said case, and returned and filed on the 14th day of March, 1898, which said chancery subpœna is in words and figures following, to wit:

UNITED STATES OF AMERICA, *District of Nebraska.*

The President of the United States of America to The Lincoln Land Company, George F. Weed, Ida B. Weed, R. Von Horrum Schramm, Viola Abbott, C. Armstrong, Mrs. S. A. Churchill, J. F. Heiserman, Mrs. A. M. Herr, Jacob Huber, Christ Klein, August Muntzing, J. W. Sheedy, M. E. Spaulding, M. L. Thomas, T. J. Tuttle, Mrs. S. J. Wlims, F. M. Adams, E. A. Berdsall, Amos Binford, Josephine Brown, T. B. Babcock, G. W. Dobler, B. F. Durham, A. W. Fields, Alex. Haldan, James Kerr, A. A. McKean, A. F. Meyer, E. J. Picard, M. W. Peck, Reed Brothers, W. A. Sheedy, P. H. Shea, Dennis Shea, A. N. Turney, F. J. Tuttle, H. H. Walrod, and The Town of Yuma, Greeting:

You are hereby commanded to be and appear at rules, to be held at the office of the clerk of the circuit court of the United States,

for the district of Nebraska, on the first Monday of March next, at the city of Omaha, then and there to answer the bill of complaint of George F. Emblen, filed December 15, 1897, against you; hence fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of February, 1898. Issued at my office in the city of Lincoln, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] OSCAR B. HILLIS, *Clerk.*

2 MEMORANDUM.—The above-named defendants to enter their appearance in this suit in the clerk's office aforesaid, on or before the day at which this writ is returnable; otherwise the bill may be taken *pro confesso.*

OSCAR B. HILLIS, *Clerk.*

WHARTON & BAIRD,
Complainant's Solicitors.

Attached to said alias subpœna are the returns of the marshal in words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 14th day of February, 1898, I received this alias chancery subpœna, and on the 16th day of February, 1898, I served the same upon the within-named Jacob Huber (now deceased) at Plattsmouth, in Cass county, State and district of Nebraska, by delivering to and leaving with John D. Ferguson, administrator of the estate of Jacob Huber, deceased, a certified copy thereof, with all the indorsements thereon.

GEO. H. THUMMEL,
United States Marshal for the District of Nebraska,
By A. G. KEIM,
Deputy United States Marshal.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 14th day of February, 1898, I received this (alias) chancery subpœna, and on the 17th day of February, 1898, I served the same upon the within-named H. H. Walrod, at Stella, Neb., in Richardson county, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

GEO. H. THUMMEL,
United States Marshal for the District of Nebraska,
By A. G. KEIM,
Deputy United States Marshal.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 14 day of February, 1898, I received this (alias) chancery subpœna, and on the 19th day of February, 1898, I served the same upon the within-named Ida B. Weed, at Fairbury, in Jefferson county, State and district of Ne-

braska, by delivering to and leaving with her a certified copy thereof, with all the indorsements thereon.

GEO. H. THUMMEL,
United States Marshal for the District of Nebraska,
By A. G. KEIM,
Deputy United States Marshal.

3 DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 14th day of February, 1898, I received this subpœna in chancery, and on the 19th day of February, 1898, I served the same upon the within-named defendant, George F. Weed, at Fairbury, in Jefferson county, State and district of Nebraska, by leaving a certified copy thereof, with all the indorsements thereon, at the usual place of residence of each of said defendants, with an adult person and resident in the family of each of said defendants.

GEO. H. THUMMEL,
United States Marshal for the District of Nebraska,
By A. G. KEIM,
Deputy United States Marshal.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 14th day of February, 1898, I received this alias chancery subpœna and on the 14th day of February, 1898, I served the same upon the within-named The Lincoln Land Company, at Lincoln, Neb., in Lancaster county, State and district of Nebraska, by delivering to and leaving with R. O. Phillips, secretary of the said Lincoln Land Company, a certified copy thereof, with all the indorsements thereon, he being the highest officer found in this district.

GEO. H. THUMMEL,
United States Marshal for the District of Nebraska,
By A. G. KEIM,
Deputy United States Marshal.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 14th day of February, 1898, I received this alias chancery subpœna, and on the 14th day of February, 1898, I served the same upon the within-named A. W. Field, at Lincoln, Neb., in Lancaster county, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

GEO. H. THUMMEL,
United States Marshal for the District of Nebraska,
By A. G. KEIM,
Deputy United States Marshal.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 15 day of Feb'y, 1898, I received this subpœna and on the 1st day of M'ch, 1898, I served the same upon the within-named C. Armstrong, one mile N. W.

Culbertson, in Hitchcock county, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

GEO. H. THUMMEL,
United States Marshal for the District of Nebraska,
By F. W. BARBER,
Deputy United States Marshal.

4 DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 15 day of Feb'y, 1898, I received this subpœna in chancery, and on the 2nd day of March, 1898, I served the same upon the within-named defendants M. E. Spaulding, at McCook, in Red Willow county, State and district of Nebraska, by leaving a certified copy thereof, with all the indorsements thereon, at the usual place of residence of each of said defendants with an adult person and resident in the family of each of said defendants.

GEO. H. THUMMEL,
United States Marshal for the District of Nebraska,
By F. W. BARBER,
Deputy United States Marshal.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 15th day of Feb'y, 1898, I received this subpœna in chancery, and on the 1st day of March, 1898, I served the same upon the within-named defendants, E. A. Birdsall, at Hastings, in Adams county, State and district of Nebraska, by leaving a certified copy thereof, with all the indorsements thereon, at the usual place of residence of each of said defendants with an adult person and resident in the family of each of said defendants.

GEO. H. THUMMEL,
United States Marshal for the District of Nebraska,
By F. W. BARBER,
Deputy United States Marshal.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 15th day of Feb., 1898, I received the within subpœna and that after diligent search I am unable to find the within-named defendants, R. Von Horrum Schramm, Viola Abbott, Mrs. S. A. Churchill, J. F. Heiserman, within my district.

GEO. H. THUMMEL,
United States Marshal for the District of Nebraska,
By F. W. BARBER,
Deputy United States Marshal.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 15 day of Feb., 1898, I received the within subpœna and that after diligent search, I am unable to find the within-named defendants, Mrs. A. M. Herr, Christ

August Muntzing, J. W. Sheedy, M. L. Thomas; T. J. Tuttle, . J. Wlims, F. M. Adams, Amos Binford, Josephine Brown, Babcock, G. W. Dobler, B. F. Durham; Alex. Haldan; within strict.

GEO. H. THUMMEL,
United States Marshal for the District of Nebraska,
By F. W. BARBER,
Deputy United States Marshal.

DISTRICT OF NEBRASKA, *ss:*

reby certify and return, that on the 15 day of Feb., 1898, I ed the within subpœna, and that after diligent search, I am to find the within-named defendants James Kerr, A. A. Me- A. F. Meyer, E. J. Picard, M. W. Peck, Reed Brothers, W. A. y, P. H. Shea, Dennis Shea, A. N. Turney, F. J. Tuttle, Town na, within my district.

GEO. H. THUMMEL,
United States Marshal for the District of Nebraska,
By F. W. BARBER,
Deputy United States Marshal.

Marshal's Costs.

e	18.00
ge	8.64
ise	12.87
	$39.51

orsed: Filed Mar. 14, 1898. Oscar B. Hillis, clerk.

reupon afterwards, to wit: at the regular November, 1898, of said court, and on the 6th day of March, 1899, the follow- roceedings were had and done in said case as appear of record journal of the proceedings of said court had on said day, to

GEORGE F. EMBLEN)
vs.
LINCOLN LAND COMPANY ET AL.)

w this day comes T. J. Mahoney, Esq., and moves the court to his appearance as one of the solicitors for the complainant, is accordingly done; and upon motion of said T. J. Mahoney

dered, that leave be and it hereby is granted the complain- file an amended bill herein, instanter, which is accordingly

reupon afterwards, to wit: on the 6th day of March, 1899, ded bill was filed in said case, which said amended bill is in s and figures following, to wit:

6 In the Circuit Court of the United States for the District of Nebraska.

GEORGE F. EMBLEN, Complainant,

vs.

THE LINCOLN LAND COMPANY, GEORGE F. WEED, IDA B. WEED, R. Von Horrum Schramm, Viola Abbott, C. Armstrong, Mrs. S. A. Churchill, J. F. Heiserman, Mrs. A. M. Herr, P. F. Huber, Christ Klein, August Muntzing, J. W. Sheedy, M. E. Spaulding, M. L. Thomas, T. J. Tuttle, Mrs. S. J. Wlims, F. M. Adams, E. A. Berdsall, Amos Binford, Josephine Brown, T. B. Babcock, G. W. Dobler, B. F. Durham, A. W. Fields, Alex. Haldan, James Kerr, A. A. McKean, A. F. Meyer, E. J. Picard, M. W. Peck, Reed Brothers, W. A. Sheedy, P. H. Shea, Dennis Shea, A. N. Turney, F. J. Tuttle, H. H. Walrod, and The Town of Yuma, Defendants.

Amended Bill of Complaint.

To the honorable the judges of the circuit court of the United States for the district of Nebraska, in chancery sitting:

George F. Emblen of Chicago, and a citizen of the State of Illinois, brings this his amended bill of complaint against the Lincoln Land Company, a corporation of the State of Nebraska, organized and existing under and by virtue of the laws of the State of Nebraska and a citizen of Nebraska, and George F. Weed and Ida B. Weed, his wife, each citizens of the State of Nebraska; Viola Abbott, Mrs. S. A. Churchill, G. F. Heiserman, Mrs. A. M. Herr, Christ Klein, S. W. Sheedy, T. J. Tuttle, and Mrs. S. J. Wlims, each residents of Yuma and each citizens of the State of Colorado, August Muntzing, a resident of Akron, and a citizen of the State of Colorado, P. F. Huber, a resident of Cass county and a citizen of the State of Nebraska, and R. Von Harrum Schramm, a resident of the city of New York, and a citizen of the State of New York, F. M. Adams, Amos Binford, Josephine Brown, G. W. Dobler, B. F. Durham, Alex. Haldan, James Kerr, A. A. McKean, A. F. Meyer, E. J. Picard, M. W. Peck, W. A. Sheedy; P. H. Shea, A. N. Turney; F. J. Tuttle, each residents of Yuma, and each citizens of the State of Colorado; C. Armstrong, a resident of McCook, and a citizen of the State of Nebraska; E. A. Berdsall, a resident of Hastings and a citizen of the State of Nebraska, T. B. Babcock, a resident of Brush, and a citizen of the State of Colorado, A. W. Fields, a resident of Lincoln and a citizen of the State of Nebraska, Reed Brothers, residents of Mankato, and citizens of the State of Kansas, M. E. Spaulding, a resident of McCook, and a citizen of the State of Nebraska; Dennis Shea, a resident of Atwood, and a citizen of the State of Colorado, Mrs.

7 H. H. Walrod, a resident of Stella, and a citizen of the State of Nebraska, and the Town of Yuma, a municipal corporation, and a citizen of the State of Colorado.

Humbly complaining unto your honors, your orator, George F. Emblen, complains and shows that he is a citizen of the State of

Illinois, as above set forth. That the defendant The Lincoln Land Company is a corporation organized and existing under and by virtue of the laws of the State of Nebraska and a citizen of the State of Nebraska, and that each of the other defendants hereinbefore named are each and all citizens of the various States as hereinbefore set forth. That the amount and matter in controversy in this cause exceeds the sum and value of two thousand dollars exclusive of interest and costs, and that for his cause of complaint against the said defendant, your orator shows unto your honors the following facts, *to wit:*

That the defendant, George F. Weed, made pre-emption cash entry for the southeast quarter of section twenty-two (2) town. two, north range forty-eight (48) west, on September 19th, 1885, at the land office of the city of Denver, such office, under the laws and the rules and regulations of the Land Department of the United States, then having such lands within its jurisdiction; that such pre-emption cash entry was made before the registrar and receiver of the land office of the United States at Denver aforesaid, and that on the 4th day of October, 1888, your orator, under the laws of the United States, then in that behalf provided, and under the rules and regulations of the Land Department of the United States, made contest against the said pre-emption cash entry of said lands and the said George F. Weed, defendant, setting forth in his said contest papers, that the said pre-emption cash entry by the said Weed was fraudulent; that the same was made for trade and town-site speculative purposes, and that he, the said Weed had never complied with the requirements of the pre-emption law of the United States as to residence on said land; that the purpose of your orator's said contest was, not only that the laws of the United States should be complied with on the part of the said Weed, defendant, in relation to the cash pre-emption entry on the public lands of the United States, but that upon the defeat of the said Weed for the causes alleged in the said contest papers, he, the said Emblen, might be enabled to enter said lands under the provisions of section two (2) of chapter eighty-nine (89) of the Laws of the United States, approved May 14th, 1880, which said section 2, under which said contest was made, and under which your orator's right of entry of said lands was assured to him upon the defeat of the pre-emption entry of the said Weed, as aforesaid, is in words and figures following, to wit:

8 "SECTION 2. In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the registrar of the land office of the district in which said land is situated, of such cancellation, and shall be allowed thirty days from the date of such notice to enter said lands; provided that said registrar shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant and not to be reported."

That your orator was at all times ready, upon the cancellation of the said pre-emption cash entry of the said Weed, as aforesaid, to comply with the requirements of the law in that behalf provided in said section, and had paid all land-office fees, and thereupon the said

contest of your orator having come on to be heard before the registrar and receiver as aforesaid at Denver, Colorado, and the same having been fully considered by the said officers, charged by the law as aforesaid with that duty the said registrar and receiver, on May 21st, 1889, recommended a dismissal of your orator's said contest upon the ground that the allegations therein were not sustained by the evidence; that thereupon your orator appealed to the Commissioner of the General Land Office at Washington, District of Columbia, as by the law in that behalf provided he was entitled to do, and the said appeal, having come on for hearing before the honorable Commissioner of said Land Office, the Honorable Lewis A. Groff, on February 20th, 1890, your orator's said appeal was sustained by the said Commissioner, and the action of the registrar and receiver, dismissing your orator's said contest, was reversed, and the said entry of the said George F. Weed, as aforesaid, was held by the said Commissioner of the General Land Office for cancellation, the said Commissioner finding that the evidence introduced before the said registrar and receiver on behalf of said Weed, relative to his compliance with the laws of the United States, in that behalf provided, that said Weed, "never before the date of said entry had become a *bona fide* resident upon said land or resided on the same in good faith;" that thereupon the said George F. Weed, by proper motion in that behalf made before the said Commissioner of the General Land Office aforesaid, moved for a review of said decision of the said Commissioner of the General Land Office, or that, in the event that said review was denied, a new hearing of the said matters in controversy between your orator as contestant and the said Weed as pre-emptor, might be ordered before the local officers, to wit: the registrar and receiver at Denver, Colorado; also at the same time there was filed with the said motion of the said Weed, an intervening petition on behalf of the town of Yuma,
9 which had theretofore been located upon said land, as hereinbefore described, in which it was alleged that there were several hundred inhabitants upon the said land, and the mayor and board of trustees of said town of Yuma petition- to be allowed to intervene in their individual rights as property-owners in said town; that thereupon the said Commissioner, in consideration of the said several motions and petitions as hereinbefore set forth, directed that a further hearing be had in order to allow the said Weed an opportunity to rebut the testimony presented by your orator at the Denver office, at the same time in his opinion holding that there was no sufficient showing why such a rehearing should be granted, but nevertheless granted the same, with an order that the said Weed should be allowed to rebut the evidence which had been introduced theretofore by your orator as contestant before the said registrar and receiver of the Denver land office; that thereupon, and before the date fixed for the hearing of said contest, under the orders of the said Commissioner of the General Land Office, as hereinbefore set forth, a new district of the public lands of the United States in Colorado, had been established at Akron, Colorado, and the land hereinbefore described was embraced within the jurisdiction of the newly

established land office, as aforesaid, and an order was duly entered by the registrar and receiver of the said Akron land office and notice thereof duly given that such hearing, so as aforesaid ordered by the Commissioner of the General — Office aforesaid should take place at Akron on the 16th day of September, 1890; that at such hearing your orator did not appear, but instead thereof filed objections to the jurisdiction of the local officers of the land office at Akron aforesaid, his reason being, among others, that the receiver of said land office, one Reed, was an interested party, being the owner of a portion of the property of the town of Yuma, the title to which property he had derived from the said Weed, pre-emption claimant. Said matter having come on for hearing before the said registrar and receiver upon the protest and objection to the jurisdiction of said officers to proceed with said hearing, the said local officers of the said Akron land office, to wit, the registrar and receiver, overruled your orator's said protest, finding as a basis of their judgment, that "the receiver does not feel prejudiced in this contest one way or the other," and the trial thereon proceeded *ex parte* on behalf of the said Weed, pre-emption claimant, and thereupon, on November 4th, 1890, the said registrar and receiver having heard the evidence as aforesaid by the pre-emptor Weed, made decision thereon as follows:

"We find the preponderance of testimony in favor of claimant's good faith in acquiring title to this land and dismiss the contest."

Thereupon your orator appealed from the decision and finding of the said registrar and receiver, so as aforesaid made November 4th, 1890, to the General Land Office of the United States, at Washington, District of Columbia, as he was by law entitled to do, and the action of the said registrar and receiver of November 4th, 1890, as hereinbefore set forth, was affirmed, and the said appeal by your orator was rejected, and thereupon your orator applied to the department of the Secretary of the Interior, which department, under the laws of the United States, has full power and direction over the public lands of the United States, and over all the local land offices having such public lands within their jurisdiction and particularly having charge and direction of the registrar and receiver at Akron, Colorado, for an order directing the Commissioner of the General Land Office to certify the record before him and before said office to the said department for examination, which application of your orator was granted by the Secretary of the Interior as aforesaid. Upon receipt of the record, duly certified, from the Commissioner of the General Land Office to the department of the Secretary of the Interior aforesaid, said Secretary, by decision made January 9th, 1893, affirmed the action of the said Commissioner of the General Land Office in dismissing the contest of your orator as aforesaid, and thereupon your orator filed a motion for review of the said last above decision by the Secretary of the Interior, which last decision was made by Secretary Noble, who was then Secretary of the Interior of the United States, and the motion for review came on for hearing before the Honorable Hoke Smith, who was at the time of the filing of said motion for review and the hearing thereof, Secre-

tary of the Interior of the United States, and the same having been heard before the Honorable Hoke Smith, as aforesaid, it was found and adjudged by him that the decision as theretofore made by the honorable Commissioner, Lewis A. Groff, in holding the said entry for cancellation was justified and that the said Weed had not resided upon the said land heretofore described, and which was sought to be pre-empted by him, the necessary length of time under the statutes of the United States in that behalf provided, and that the entry of the said Wood was fraudulent and void, and that the said receiver, to wit, one Reed, being interested in the town site of Yuma, holding a portion of the land thereof by deed from the said Weed, had not jurisdiction as such receiver to hear and pass upon the questions involved in said contest, and that

11 in view of the facts hereinbefore set forth, as well as upon the ground of newly discovered evidence, which was placed before the said Honorable Hoke Smith, Secretary of the Interior, as aforesaid, upon the hearing of said motion for review, a rehearing of said whole contest proceeding was ordered by the said Secretary of the Interior before officers competent to discharge the duties as such registrar and receiver, and such registrar and receiver were ordered to proceed to a new hearing upon proper notice to the parties in interest therein by the said Secretary of the Interior, which decision of the said Secretary of the Interior was transmitted to the registrar and receiver of the Akron land office at Akron, Colorado, on October 30th, 1893, and thereupon the said registrar and receiver set the case for hearing upon the 3rd day of January, 1894, at 10 o'clock a. m., and notified the respective parties of said date of rehearing and review. A copy of said decision, under the hand of said registrar and receiver of said Akron land office, duly certified, is hereto attached marked "Exhibit A" and made a part of this, your orator's bill of complaint. The said defendant George F. Weed and all others in interest in said land received notice of the date of said hearing forty days and more prior to the said 3rd day of January, 1894, and thereupon, having full knowledge of the views of the Secretary of the Interior as to the integrity of the said pre-emption claim by the said Weed, the said opinion of said Secretary of the Interior, hereto attached, marked "Exhibit A" having been read by the said Weed and others interested in the said controversy, it was determined by and between the said Weed, the mayor and trustees of the town of Yuma and other property-owners therein, whose names are to your orator at the present time unknown, that an application for continuance should be made to said registrar and receiver of the Akron land office for a continuance of the said hearing so as aforesaid set for January 3rd, 1894, and to that view it was conspired by and between the said George F. Weed and the said registrar and receiver of the land office aforesaid, and others to your orator unknown, that such continuance should be had for a sufficient length of time to enable the said Weed and his co-conspirators, as aforesaid, to procure the passage of an act of Congress, whereby the said contest should be eliminated and the title to said land hereinbefore described, should be adjudged by the said act of Congress to

be in the said George F. Weed, and that a patent should be issued thereon, and to this end the said George F. Weed, the said mayor and trustees, and other officers of the town of Yuma, waited until the 16th day of December, 1893, before such application for continuance was made, and thereupon, upon said last-mentioned date, the said George F. Weed, Alexander F. Meyer, as mayor of the said town of Yuma, and one J. B. Decker, claiming to be the town
12 clerk of the town board of Yuma, Colorado, filed affidavits for continuance of said rehearing, so as aforesaid ordered by the Honorable Hoke Smith, Secretary of the Interior of the United States as aforesaid, and thereupon the said registrar and receiver did grant a continuance of the rehearing of said contest cause.

And thereupon, and in aid of the conspiracy, so as aforesaid formed between said parties as aforesaid, and for the purpose of preventing a rehearing of said cause under the order of the Secretary of the Interior, as aforesaid, and for the purpose of preventing the cancellation of the said cash pre-emption entry, so as aforesaid attempted to be made by the said George F. Weed, and to prevent a successful issue of your orator's said contest, there was an act of Congress passed and approved December 29th, 1894, entitled, "An act to perfect the title to a quarter section of land in the town of Yuma, Colorado;" which act is in words and figures following, to wit:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the pre-emption cash entry numbered 4990, of George F. Weed, made at the district land office at Denver, Colorado, on the 19th of September, 1885, for the southeast quarter of section twenty-two (22) township two (2) north of range forty-eight (48) west, which tract embraces the town of Yuma, Colorado, the county-seat of Yuma county, Colorado, be and the same is hereby confirmed and that patents of the United States issue therefor to the said Weed."

Your orator further shows that at the time of the passage of said act of Congress, not only was the question of title pending in the Land Department of the United States, a department which, by the Constitution and laws of the United States is solely charged with the duties of determining the rights of pre-emptors and contestants and the right to issue patent therefor to the parties entitled thereto, but there was no question of any title to be perfected, as was set forth in the said act of Congress aforesaid, and there was no subject-matter relative to said lands, as aforesaid, with which Congress had the right, power or jurisdiction to interfere or to adjudicate the title thereto; that during the passage of the said act of Congress, and while the same was pending before both the Senate and the House of Representatives of the Congress of the United States, the various committees of the two Houses made application to the Commissioner of the General Land Office, as well as to the Secretary of the Interior, relative to the necessity and the propriety of the passage of said bill hereinbefore set forth; and thereupon, on February 22nd, 1894, S. W. Lamoreaux, then Commissioner of the General Land Office of the
13 United States, by a communication addressed to the then Secretary of the Interior of the United States, wherein was

set forth the full history of the contest in relation to the pre-emption of said land by the said Weed; whereupon the said Secretary of the Interior transmitted to the chairman of the Committee of Public Lands of the House of Representatives of the United States, the said report of the said Commissioner of the General Land Office upon said bill, which communications are part of the public archives and documents of the Land Department of the United States, as well as of the Congress of the United States, and are hereto attached, the first marked "Exhibit C" and the second marked "Exhibit D" and each made a part of this bill of complaint.

Your orator further represents that the said pretended pre-emption cash entry by the said Weed as aforesaid of the said lands as aforesaid, was fraudulent, in that the said pre-emptor had attempted to obtain possession of a part of the public domain of the United States without having first complied with the laws of the United States in regard thereto; that at the time the said Weed made the said pretended pre-emption cash entry, he had not resided upon said lands the required length of time by the act of Congress in that behalf provided; that he had attempted to make such pre-emption cash entry solely for speculative and town-site purposes under an agreement theretofore entered into between himself and the defendant, The Lincoln Land Company, which was a corporation organized under the laws of the State of Nebraska, having its headquarters therein, and a citizen thereof, and doing business in said State as well as in Colorado, whereby it was agreed that upon such pre-emption entry becoming perfect, said Weed should convey an undivided half of the said lands to the said Lincoln Land Company for the purpose of having the same laid out in town lots, streets and alleys, whereby the same might be sold for speculative purposes.

And your orator further avers, that under the act of Congress hereinbefore cited, to wit: section 2 of the act of Congress approved May 14th, 1880, he had a vested right to enter the said land upon the determination of the said contest which he was then urging in his favor and against the said Weed. That had said proceeding been permitted to continue to a determination thereof for the officers of the Land Department your orator would have established conclusively the (—) alleged by him against the said Weed and would have procured a cancellation of the entry of the said Weed and your orator was then and there at said time entitled to a final
14 order of cancellation of the said entry, and that the passage of the said act of Congress and the issuance of the patent thereunder by the President of the United States, was depriving him of a vested right without due process of the law and was a denial to your orator of the equal protection of the law, and that by the said attempt to pre-empt the said land, and the contest as hereinbefore set forth, the said land had ceased to be public lands of the United States, having become, by reason of said proceedings, segregated from the body of public lands of the United States and had become private lands, over which Congress had no power or control, and the said act of Congress was therefore unconstitutional and void, all of which the said defendants herein named had full knowledge

of at the time they took title to the said respective pieces of property, as hereinafter set forth.

Your orator further shows unto the court, that in furtherance of said conspiracy, and to carry out the contract and agreement hereinbefore set forth and to enable the town of Yuma to become incorporated and to lay a portion of said land as hereinbefore described, out into town lots, blocks, streets and alleys, for the purpose of speculation, and to encumber thereby the title to said lands, which the said defendants, the said Weed and Weed and The Lincoln Land Co., knew at the time of the incorporation of the said town of Yuma of right belonged to your orator to enter the same under the act of Congress hereinbefore set forth, he, the said George F. Weed and Ida B. Weed, his wife, defendants conveyed in January, 1886, by two deeds, an undivided half of said lands hereinbefore described to the Lincoln Land Company, for and in consideration of the sum of one dollar ($1.00) as expressed in said deeds, no other or further consideration moving from the said Lincoln Land Company to the said Weed and Weed for such conveyances, and in January, 1886, the plat of the said town of Yuma aforesaid was recorded, embracing forty acres of the said land, so as aforesaid pretended to have been pre-empted by the defendant, George F. Weed, said land having been surveyed into lots and blocks, streets and alleys, which said town of Yuma has, under the laws of Colorado, become an incorporated town, and is now such incorporated town, having a mayor and other officers in charge of its affairs and municipal government, and thereafter, upon other portions of said land, so as aforesaid attempted to be pre-empted by the said George F. Weed, there has been laid out into lots, blocks, streets and alleys, what is known as the First addition of said town of Yuma, and thereafter at certain dates, the exact dates of which are now unknown to your orator, the said George F. Weed conveyed to his said wife, Ida B. Weed, the remaining portion of said lands not theretofore conveyed to the defendant, The Lincoln Land Company, said last-named conveyance being without consideration moving from the said Ida B. to the said George F. Weed, and the said Ida B. Weed is now, under said conveyance, the pretended owner of the undivided one-half of the southeast quarter of section twenty-two (22) town two (2) range forty-eight (48) except that portion which had heretofore been platted into the town of Yuma aforesaid, and said Lincoln Land Company now claims to be the owner of lots three (3), five (5), and seven (7) in block one (1) lots four (4) and eighteen (18) in block three (3), lots one (1), five (5), nine (9), eleven (11) and thirteen (13), in block four (4); lots three (3), nine (9) and eleven (11) in block five (5); lots four (4) and six (6) in block seven (7); lots two (2), four (4), six (6), eight (8), and ten (10) in block eight (8); lots one (1), three (3), five (5), seven (7), nine (9) and eleven in block nine (9); lots three (3) and fourteen (14) in block ten (10); lots fourteen (14) and sixteen (16) in block eleven (11); and lot ten (10) in block twelve (12), in the original tow- site of Yuma as aforesaid; and also lots two (2), four (4), six (6), eight (8), nine (9), eleven (11), thirteen (13), fifteen (15) and seventeen (17) in block one (1);

lots one (1), three (3), eight (8), ten (10) and twelve (12) in block two (2); lots eight (8) and ten (10) in block three (3); lots five (5), seven (7), nine (9) and eleven (11) in block four (4); lots five (5), seven (7), nine (9), and eleven (11) in block five (5); lots five (5), nine (9), eleven (11), thirteen (13) and fifteen (15) in block six (6); lots one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13) and fifteen (15) in block seven (7); lots one (1), three (3), five (5), seven (7), nine (9) and eleven (11) in block eight (8); lots four (4), six (6), eight (8) and ten (10) in block nine (9); lots two (2), four (4), eight (8), ten (10), twelve (12), fourteen (14), sixteen (16) and eighteen (18) in block ten (10); lots two (2), four (4), six (6), eight (8), ten (10), fourteen (14), sixteen (16) and eighteen (18) in block eleven (11); lots four (4), six (6), eight (8), ten (10) and twelve (12) in block thirteen (13) in the First addition to the town site of Yuma.

And your orator avers that the said Lincoln Land Company, defendant, claims to be the owner of other portions of said original above-described lands, so as aforesaid pretended to have been pre-empted by the said Weed but the exact description of which is unknown to your orator at the present time.

And your orator further avers, that the other defendants to this bill of complaint claim to own and be in possession of the following-described portions of said land hereinbefore first described as
16 having pretended to have been pre-empted by the said Weed, to wit: Viola Abbott, the improvements upon lots thirteen (13) and fourteen (14) in block three (3) of Yuma; C. Armstrong, lot nine (9) in block seven (7), and lot- nine (9) eight (8) in Yuma, aforesaid; Mrs. S. A. Churchill, lot fifteen (15) block ten (10) in Yuma aforesaid; J. F. Heiserman, lot nine (9) in block twelve (12) in Yuma aforesaid, and lot eight (8) in block seven (7) in the First addition to Yuma aforesaid; Mrs. A. M. Herr, lots eleven (11) and twelve (12) in block ten (10), of Yuma aforesaid; Jacob Huber, lot eight (8) in block thirty-one (31) in Yuma aforesaid, and lots five (5) and six (6) in block three (3) of the First addition to Yuma aforesaid; Christ Klein, lot three (3) in block four (4) of the First addition to Yuma aforesaid; August Muntzing, lots two (2) and three (3) in block twelve (12) of Yuma, aforesaid; R. Von Horrum Schramm, of the west half of lots eleven (11) and twelve (12) in block three (3) lot four (4) in block four (4) lots seven (7) and eight (8) in block six (6) lots six (6) and nine (9) in block eight (8), lots ten (10) and twelve (12) in block eight (8) lots three (3) nine (9) and eleven (11) in block ten (10), lot nine (9) in block eleven (11), lots five (5) seven (7) nine (9) and eleven (11) in block twelve (12), lot eleven (11) in block thirteen (13) lots five (5) and six (6) in block two (2) in the First addition to Yuma aforesaid; also lots one (1) eight (8) and nine (9) in block one (1) lots three (3) nine (9) and ten (10) in block two (2) lots one (1) and two (2) in block three (3), lots one (1) and seven (7) in block five (5), lots two (2) three (3) four (4) five (5) and seven (7) in block six (6), lots ten (10) and fifteen (15) in block seven (7) lots sixteen (16) seventeen (17) and eighteen (18) in block ten (10) and lots eleven (11) and twelve (12) in block twelve (12) of the town of Yuma, afore-

said; J. W. Sheedy, lot nine (9) in block six (6) lots thirteen (13) and fourteen (14) in block three (3) except forty-four (44) feet of the east end of the said two last lots, all of which are in the town of Yuma, aforesaid; M. E. Spaulding, lot eleven (11) in block seven (7) and lot nine (9) in block eleven (11) in Yuma, aforesaid; T. J. Tuttle, the east half of lots sixteen (16) and seventeen (17) and eighteen (18) in block thirteen (13) in Yuma aforesaid; Mrs. S. J. Wlims, lot four (4) in block five (5) of the town of Yuma aforesaid; F. M. Adams, lots seven (7) and eight (8) in block two (2) and lots five (5) and six (6) in block five (5) in the town of Yuma aforesaid; E. A. Berdsall, lot eight (8) in block eleven (11) in the town of Yuma, aforesaid; Amos Binford, lot fourteen (14) in block six (6) lots thirteen (13) and seventeen (17) in block eleven (11) in the First addition to the town of Yuma, aforesaid; Josephine Brown, lot four (4) in block seven (7) in the First addition to Yuma aforesaid; F. B. Babcock, lots one (1), two (2) twelve (12) thirteen (13) fourteen (14) fifteen (15) sixteen (16) in block two (2) in Yuma aforesaid; G. W. Dobler, lot eight (8) in block seven (7)
17 in Yuma, aforesaid; and lot three (3) in block twelve (12), lots one (1), two (2) and nine (9) in block thirteen (13) in the First addition to Yuma, aforesaid; B. F. Durham, lots eleven (11) and twelve (12) in block three (3) in Yuma, aforesaid; A. W. Field, lot eleven (11) in block six (6) in Yuma aforesaid; Alex. Haldan, lot one (1) in block ten (10) in the First addition to Yuma and lot five (5) in block eleven (11) in Yuma, aforesaid; James Kerr, lot three (3) in block three (3) in Yuma, aforesaid; A. A. McKean, lot eleven (11), First addition to Yuma, aforesaid; A. F. Meyer, lots one (1) and two (2) in block eleven (11) and lot thirteen (13) in block seven (7) in Yuma, aforesaid; and the east half of lots eleven (11) and twelve (12) in block three (3) First addition to Yuma, aforesaid; E. J. Picard, forty-four (44) feet of lots thirteen (13) and the east end of lot fourteen (14) in block three (3) in Yuma, aforesaid; M. W. Peck, lot eleven (11) in block two (2) in Yuma, aforesaid; Reed Brothers, lot twelve (12) in block seven (7) in Yuma, aforesaid; James Sheedy, lot fourteen (14) in block three (3) in Yuma, aforesaid, and lot eight (8) in block five addition to Yuma, aforesaid; W. A. Sheedy, lots one (1) and two (2) in block ten (10) and lots one (1) and two (2) in block seven (7) in Yuma, aforesaid; Dennis Shea, lot seventeen (17) in block seven (7) in Yuma, aforesaid; A. N. Turney, lot five (5) in block seven (7) in Yuma, aforesaid; T. J. Tuttle, the east half of lots sixteen (16), seventeen (17) and eighteen (18) in block thirteen (13) in the town of Yuma, aforesaid; Mrs. H. H. Walrod, lots one (1) and two (2) in block three (3) in Yuma, aforesaid.

That at the time of the purchase of the aforesaid property by the said several defendants and the entering into the possession thereof by each of them, they each and all knew that the said pretended pre-emptor, George F. Weed, had not resided upon said lands hereinbefore described the necessary length of time, as required by the statutes of the United States before the date of his said pretended cash entry, and that each knew that the lumber for the shanty pre-

tended to have been erected upon said land in pretended compliance with the laws of the United States in that behalf provided for pre-emptors, was not shipped to the said Weed until in April, 1885, and that his said shanty, pretended to have been erected upon said first-described lands in conformity with the laws of the United States, was not erected until after such dates, also that each had been advised and knew, not only as a matter of law, but as a matter of fact, that the said pretended cash entry by the said Weed was in litigation under the laws of the United States between your orator and the said Weed; that said pretended cash entry had been can-
18 celled by the proper land department for the reasons hereinbefore set forth by the Commissioner of the General -and Office, and by the Secretary of the Interior, as aforesaid, and that each knew that the passage of the pretended act of Congress was unconstitutional and void, and that the patents issued to the said Weed in conformity with the provisions of the said act of Congress conveyed to said Weed no title whatever, and that your orator was therefore deprived of a vested right and of the equal protection of the laws of the United States, and that whatever title they took from the said Weed or from the said Lincoln Land Company, or from other grantors of said lands hereinbefore described, or any portion thereof, was held in trust for your orator, and that your orator had a beneficial interest therein and was entitled to make entry of said lands under the laws of the United States and to secure a patent therefor: and your orator avers that the various defendants to this bill of complaint, each and all, now hold the title to said various pieces of property in trust for him, and that whatever moneys have been received by said defendants or any of them, of right and justice belong to your orator and that your orator is entitled to an account of the matters and things alleged, and to have the said patent of the United States, issued under the provisions of the said act of Congress, hereinbefore described, set aside and held for naught as unconstitutional and void, and that said various mesne conveyances should be set aside, and your orator adjudged to be the owner and entitled to the possession of the said property, in this, to wit: the southeast quarter of section twenty-two (22) township two (2) north, range forty-eight (48) west as hereinbefore set forth.

Your orator is informed and believes that the said several defendants now pretend and claim to have some rights and that your orator has lost whatever rights he acquired and might have acquired by the contest of said fraudulent entry by reason of a certain alleged waiver or relinquishment filed by your orator in the local land office at Denver, Colorado, on or about the 27th day of April, 1889, in words and figures following, to wit:

"GEORGE F. EMBLEN
vs.
GEORGE F. WEED.

Before the register and receiver, Denver, Colorado.

Involving said Weed's pre-emption cash entry No. 4990, made Sept. 19th, 1885, upon the S. E. (½) sec. 32, tp. 2 north, of R. 48 west.

Now on this 27th day of April, 1889, comes said George F. Emblen, contestant, and being duly sworn under oath says that he claims no preference right of entry upon said land above described 19 under the second section of the act of May 14th, 1880, and that he hereby relinquishes any and all preference right to said land under the act aforesaid.

GEORGE F. EMBLEN.

Subscribed and sworn to before me this 27th day of April, 1889.
F. J. MOTT, *Register.*"

But in that behalf your orator shows to the court that notwithstanding on or about the 27th day of April, 1897, he did file a paper in words and figures as above in the office of the register and receiver of the U. S. local land office at Denver, Colorado, that said paper is wholly inoperative and ineffectual as a release, relinquishment, waiver or abandonment of any of your orator's rights in said contest or such rights as had accrued or might thereafter accrue by reason of said contest under and by virtue of the said second section of the said act of May 14th, 1880. That said paper was not authorized, contemplated or provided for by law, that said paper was filed before a hearing upon the merits of the said contest and that said paper was never received, accepted or relied on or acted on by either the Government of the United States or the said George F. Weed as a release, or relinquishment or abandonment of your orator's rights under the said act of 1880.

And further in this regard your orator shows unto your honors that prior to the 27th day of April, A. D. 1889, the Commissioner of the General Land Office of the United States by and under the direction and with the approval of the Secretary of the Interior had prepared, adopted and promulgated a set of rules of practice for proceedings before registers and receivers of the various land offices of the United States and said rules of practice being authorized by law were upon said 27th day of April, 1889, and prior and subsequent thereto in full force and effect and had then and there all the force, validity and effect of statutes of the United States except in so far as any of said rules might be found to be conflicting with any of the acts of Congress in force. That among such rules so as aforesaid adopted, promulgated and in force were two, respectively, rule 54 and rule 55, as follows, to wit:

"Rule 54. Parties contesting pre-emption, homestead or timber-culture entries, and claiming preference rights of entry under the second section of the act of May 14, 1880 (21 Stat., 140), must pay the costs of contest."

"Rule 55. In other contested cases each party must pay the costs of taking the testimony upon his own direct and cross-examination."

That on said 27th day of April, 1889, the said contest then and there pending respecting the said entry of the said Weed having come on for hearing before the register and receiver of the United States local land office at Denver, Colorado, your orator was informed and believed that it was then and there the purpose and intention of the said Weed to overwhelm your orator by the accumulation of excessive and unnecessary costs in the taking of a large and unnecessary amount of irrelevant testimony, and your orator believing said information to be true and fearing that if he continued the said contest as a claimant to the preference right under the said second section of the act of May, 1880, and was obliged to pay all the costs of the contest that was required by the aforesaid rule 54, that so great an amount of costs would be made in said contest that he would be unable to pay the same that he would thereby lose his right to prosecute said contest and thereupon by reason of said information and by reason of said fear that he was about to be oppressed by the accumulation of excessive costs under the said rule, your orator did make and sign the paper of which copy is hereinabove set forth and did then and there file and tender the same to the register and receiver of the local land office at Denver, at the same time filing and tendering to said register and receiver a motion on behalf of your orator as contestant in said proceeding to have the costs of the said contest taxed under the aforesaid rule 55.

That thereupon and on consideration of the said motion which said motion was coupled with and based on said offer of relinquishment and which said offer of relinquishment was made with a view to said motion and which said offer of relinquishment and said motion were made by your orator for the purpose of procuring an order directing that the costs of the said contest be taxed under the aforesaid rule 55 instead of the said rule 54 and that if the costs should be so taxed, your orator would thence and thereafter abandon all claim to any preference right under said second section of the act of May 14th, 1880, said register and receiver rejected said offer of relinquishment and overruled said motion, but your orator further shows unto your honors that upon the presentation of said offer of relinquishment and said motion the said register and receiver of the said land office at Denver did then and there rule and decide that your said orator having commenced said contest as a claimant of preference right under the said act of May 14th, 1880, the status of your said orator would not be permitted to be changed and the said register and receiver of the said land office did then and there upon consideration of said offer of relinquishment and said motion rule and decide that your said orator should continue in said contest as a contestant claiming preference right under the said act of 1880 and that the costs of the said contest should be taxed and paid as provided in the aforesaid rule 54 of rules of practice. That thereupon your orator submitted to the said ruling and decision of the said

register and receiver and did then and there and thenceforward abide by the same. That no appeal was taken from said ruling of the said register and receiver and the same was never vacated or modified but remained thereafter in full force and effect and your said orator did then and there at the said hearing at the said local land office at Denver before the said register and receiver and did then and there pay all of the said costs of said contests as fast as said costs were made and your said orator further shows unto your honors that the said Weed having at the time your orator offered to make said relinquishment sought to be permitted (—) said contest under rule 55, resisted said application of your orator and the said register and receiver having decided the said motion of your orator adversely to your said orator and your said orator then and there submitted to a quietus in said decision, the said decision never having been appealed from, and the said Weed then and there having accepted the benefit of said decision of the said local land officers, and your said orator having paid the costs of the said contest in accordance with said rule 54 and the said Weed having procured and accepted the benefits of the said decision of the said local land officers requiring your orator to pay said costs in accordance with said rule 54, and having obtained said benefit and advantage by virtue of said decision, deciding that your orator was obliged to maintain his status in said contest as a claimant of preference right under said act of May 14th, 1880, the said Weed and all persons claiming by, through or under him and each and every of the contestants herein is and are hereby estopped to now claim, set up or aver that said contest was not prosecuted by your orator as a contestant claiming preference right under said act of 1880 and are estopped to allege, set up or aver that your orator *is* by reason of the tender of the said relinquishment and the filing of the said paper in the said local land office waive or abandon any of his rights thereby.

Your orator further alleges that he is without remedy at and by the strict rules of the common law, and can obtain relief only in courts of equity, where such matters are accountable and relievable.

Forasmuch therefore as your orator is without remedy in the premises other than as heretofore prayed, therefore your orator humbly beseeches said court that the said several defendants, to wit: The Lincoln Land Company, George F. Weed, Ida B. Weed, R. von Horrum Schramm, Viola Abbott, C. Armstrong, Mrs. S. A. Churchill, J. F. Heiserman, Mrs. A. M. Herr, Jacob Huber, Christ Klein, August Muntzing, J. W. Sheedy, M. E. Spaulding, M. L. Thomas, T. J. Tuttle, Mrs. S. J. Wlims, F. M. Adams, E. A. Berdsall, Amos Binford, Josephine Brown, T. B. Babcock, G. W. Dobler, B. F. Durham, A. W. Fields, Alex. Haldan, James Kerr, A. A. McKean, A. F. Meyer, E. J. Picard, M. W. Peck, Reed Brothers, W. A. Sheedy, P. H. Shea, Dennis Shea, A. N. Turney, F. J. Tuttle, H. H. Walrod and The Town of Yuma, Colorado, may be summoned in due form of law, to answer this, his bill of complaint, and each of the allegations therein contained (the answer under oath being hereby waived), and that a decree may be entered against the said

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several defendants as aforesaid, commanding them and each of them to account to your orator for any and all sums of money received by them and each of them for and on account of the premises hereinbefore set forth, and that it may be specifically decreed that the said several defendants hold said property as hereinbefore described in trust for the use and benefit of your orator, and that the said patent of the United States, so as aforesaid issued to the said Weed, defendant, conveyed no title to said property to the said Weed or any right or interest therein to him, the said Weed, and that the said Weed, by his several conveyances to the Lincoln Land Company and to Ida B. Weed, his wife, conveyed no title to said defendants, and that none of the defendants took any title or right or interest in said property under and by virtue of said patent or of said conveyances, except that they hold said titles in trust for your orator as aforesaid; and that your orator may have such other and further relief as to your honors shall seem meet.

May it please you to grant unto your orator the most gracious writ of subpœna, issued out of and under the direction and seal of this court, directed to the said defendants, to wit (the full given names of defendants are unknown to your orator except as herein indicated): The Lincoln Land Company, George F. Weed, Ida B. Weed, R. von Horrum Schramm, Viola Abbott, C. Armstrong, Mrs. S. A. Churchill, J. F. Heiserman, Mrs. A. M. Herr, Jacob Huber, Christ Klein, August Muntzing, J. W. Sheedy, M. E. Spaulding, M. L. Thomas, T. J. Tuttle, Mrs. S. J. Wlims, F. M. Adams, E. A. Berdsall, Amos Binford, Josephine Brown, T. B. Babcock, G. W. Dobler, B. F. Durham, A. W. Fields, Alex. Haldan, James Kerr, A. A. McKean, A. F. Meyer, E. J. Picard, M. W. Peck, Reed Brothers, W. A. Sheedy, P. H. Shea, Dennis Shea, A. N. Turney, F. J. Tuttle, Mrs. H. H. Walrod and The Town of Yuma, Colorado, commanding each of them to be and appear before said court on a day and year to be therein named, under the certain pains and penalties therein expressed, and that they then and there each and all, answer
23 this bill of complaint and then and there abide any order, judgment or decree which shall be entered herein; and your orator will ever pray, etc.

GEORGE F. EMBLEN,
By T. J. MAHONEY,
E. R. DUFFIE,
His Solicitors.

STATE OF NEBRASKA, }
County of Douglas, } ss:

George F. Emblen, being first duly sworn, deposes and says: That he is the complainant in the foregoing bill of complaint and that he has read the same and knows the contents thereof, and that the facts therein stated are true of his own knowledge.

GEORGE F. EMBLEN.

Subscribed and sworn to before me this 4th day of March, 1899.

[SEAL.] T. J. MAHONEY,
Notary Public, Douglas County, Nebraska.

EXHIBIT "A."

391–1893.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August* 25, 1893.

GEORGE F. EMBLEN
vs.
GEORGE F. WEED.

Commissioner of the General Land Office.

SIR: On March 2, 1893, George F. Emblen filed in this office his motion for review and reversal of the decision of the department in the case of said Emblen *vs.* George F. Weed, 16 L. D., 28, alleging the following grounds of error:

1. In not finding that the contestant had proven the allegations of his contest affidavit, as he proved that Weed did not reside upon the land in controversy, and there was no proof contradicting or tending to contradict said testimony.

2. In not holding that it was error to order a further hearing after the case had been duly closed and after Weed had waived all right to offer testimony by declining to do so when he had his day in court.

3. In considering the testimony taken at said hearing on September 16, 1890, when said testimony was wholly incompetent because not offered at the only hearing at which said Weed had a right to offer testimony.

4. In not disregarding all testimony taken at the hearing of September 16, 1890, and not declaring all proceedings under said testimony as null and void because the case had been legally closed to all parties.

5. In not declaring that the only competent testimony in the record was that taken on April 25, 1889, and in not holding
24 from said testimony in favor of the contestant because said testimony clearly shows that Weed did not reside upon the land, as very fully appears by reference to the testimony of Edward Dunn, Sarah Dunn and Mrs. Charles Harvey.

6. In not holding that it was error in the Commission- of the General Land Office in recalling and revoking his order of cancellation because said order of cancellation was warranted by the undisputed testimony taken at the hearing on April 25th, 1889.

7. In deciding the case upon a mutilated and insufficient record, as the papers originally filed in the case were not all on file when the honorable Secretary rendered his decision, to wit: the first two pages of the testimony taken at Denver, April 25, 1889; the lumber bills signed by George Fred Weed, at Benkleman, Nebraska, during the months of August, October and November, 1885; also a photograph filed in the case. Said lumber bills tended strongly to contradict the contention that Weed lived on the land at the time claimed by him.

8. In deciding the case upon this incomplete record when the

papers in the case had been tampered with for a corrupt purpose, or had (—) accidentally mutilated, by which the rights of Emblen had been prejudiced. Whereas, if the entire record had been before the department, it might have reached a different conclusion.

9. In holding contrary to the law.

10. In finding contrary to the evidence.

Subsequently Weed, by his counsel, moved to dismiss same, because not filed in time.

April 4, 1893, Emblen, in support of his motion, filed his affidavit showing that since the trial he had discovered new evidence, which consists of two waybills of lumber and hardware shipped from Denver on April 15 and 21, 1885, to George F. Weed, the claimant, which Emblen, in his said affidavit, alleges to have been used by Weed, in the construction of his shanty on the claim. Copies of these waybills are attached to this affidavit.

Weed made pre-emption cash entry for the S. E. ¼ of sec. 22, T. 2, N., R. 48 W., Denver, now Akron, Colorado, September 19, 1885.

On the fourth day of the next month Emblen filed an affidavit of contest against said entry, alleging that it was fraudulently made for trade and town-site purpose, and that he had never complied with the requirements of the pre-emption law as to residence on the land, etc.

May 21, 1889, the local officers at Denver recommended a dismissal of the contest, upon the ground that the allegations therein were not sustained by the evidence.

25 Emblen appealed, and on February 20, 1890, your office reversed the action of the registrar and receiver, and held the entry for cancellation, finding that the evidence showed that "said Weed never before date of said entry became a *bona fide* resident upon said land, or resided on the same in good faith."

Weed moved for a review of said decision, and asked, if that could not be granted, that a new hearing might be ordered before the local office.

In the meantime, a town of several hundred inhabitants had been built upon the land, and the mayor and board of trustees of the town petitioned that a hearing be granted, and that they be allowed to intervene and be made parties defendant. Several citizens of the town asked also for a rehearing and to be allowed to intervene in their individual rights as property-owners in the town.

On consideration of these several motions and petitions, your predecessors, while holding that no sufficient showing had been made upon which to grant a rehearing, directed a further hearing to be had, in order to allow Weed to rebut the testimony presented by Emblen at the Denver office, the contest there having been dismissed on the evidence produced by the contestant, the defendant having introduced no testimony, except a deposition taken at the instance of the contestant, and a certified copy of the final proof testimony.

It was also ordered that at the new or supplemental hearing, the defendant should first introduce his testimony, after which the contestant would be allowed to offer other testimony in rebuttal.

Before the date fixed for the hearing, a land office was established at Akron, Colorado, which embraced in its jurisdiction the land in controversy. In consequence of this change in jurisdiction, all the papers in the case were transferred to the Akron office, and the parties in interest were notified by the registrar of that office to appear there on the 16th of September, 1890, and submit their additional testimony.

Emblen made no appearance at this hearing, but forwarded through the mail a protest against the jurisdiction of the Akron officers, for the reason that the receiver of said office was an interested party because he was the owner of a lot in the town of Yuma, the title for which he had derived from Weed, the claimant. His protest was overruled, upon the ground, as stated by the local officers, that "the receiver does not feel prejudiced in this contest one way or the other;" and the trial proceeded *ex parte*.

26 Weed introduced a great number of witnesses, nearly all of whom were residents of Yuma, their testimony going to show that Weed had complied with the requirements of the law as to residence, etc., and also impeaching the credibility of two of the main witnesses for the contestant, who had been examined at the Denver office. Testimony was also introduced to impeach and destroy the character of Emblen, the contestant.

November 4, 1890, the local officers rendered their decision as follows: "We find the preponderance of testimony in favor of claimant's good faith in acquiring title to this land, and dismiss the contest."

Emblen appealed, and on May 28, 1891, your office affirmed the action of the local office, and held that Emblen had no right to appeal, because (as appears from the record) he had waived his claim to preference right at the date of the hearing at the Denver office.

Upon the rejection of this appeal, Emblen applied to this department for an order directing your office to certify the record here for examination, which was granted (see 13 L. D., 722). Upon receipt of the record, this department, by decision of date January 9, 1893 (16 L. D., 28), affirmed the action of your office in dismissing the contest, and it is for review of this judgment that the motion now before me was filed.

The charges contained in the brief of counsel for contestant, against the good faith of the entryman, are so grave that the whole record, including the testimony at both hearings, has been carefully examined.

The evidence adduced at the first hearing, which was had at Denver, unquestionably warranted the decision of your predecessor, Commissioner Groff, in holding the entry for cancellation. Three witnesses for the contestant swore that the claimant had never resided on the land; two of them, Dunn and his wife, testified that the house on the claim was not built until the latter part of April, 1885, and that it leaked and was uninhabitable; that they themselves moved into it and remained there a week or two during the time Weed claimed to have resided there, and were forced to aban-

don it because it would not shed water; that during all the time he claimed to reside there he was only an occasional visitor, coming on the morning train and leaving on the return train the same day. Dunn was employed to build his shanty, and his wife washed for Weed. He would bring his clothes to her from Benkleman. Mrs. Harvey corroborated them as to this non-residence on the land.

27 The defendant did not testify, but introduced a certified copy of his final proof, and also a deposition of one Foster, which had been taken by the contestant, but not introduced by him.

Mr. Foster's testimony was to the effect that he was a grocery keeper in Yuma from August 10, 1885, until the spring of 1887; that his store was situated on the railroad company's right of way until April or May, 1886, when he moved it on the tract in controversy. As to Weed's residence and occupation of the shanty, his testimony is as follows:

I know that George F. Weed had a house and resided on the S. E. ¼ sec. 22, T. 2 N. R. 48 west, as I often see him there; visited him in his house; called once before he was up in the morning; saw him in bed; have seen smoke issuing from his stovepipe; have seen supplies of provisions in his house, that he had prepared for use of my own knowledge; I do not know that he had any other home during this time up to 1886.

Some other depositions were had tending to show that during the summer Weed claimed to reside upon his claim he was foreman and manager of a lumber yard in Benkleman, Nebraska, said to be about eighty miles from the land, and upon this testimony the local officers found that the evidence was not sufficient to "warrant us in overruling the former decision of this office," and dismissed the contest. The "former decision" referred to was the acceptance of the final proof.

At the hearing ordered and had at the Akron office, fifteen witnesses were examined by Weed. Of all these, but two testify to his continuous residence upon the land. These two witnesses are William C. Orum and T. B. Babcock, who were also his final-proof witnesses. The remaining thirteen witnesses were used chiefly to impeach the testimony of Dunn and his wife, who were witnesses for the contestant. His own testimony and that of Orum and Babcock is to the effect that he built his shanty on the land in the month of February, 1885. Dunn and his wife, at the Denver hearing, say that his shanty was not built until the latter part of April. He says that his first act of settlement was building his house, when he immediately moved into and remained there until September, 1886. Although many witnesses at the Akron hearing swear that Dunn's reputation is bad, and that they would not believe him under oath, and that his wife was so completely under his control as to vitiate her testimony; yet the evidence discovered since the hearing, on its face, seems to show that these impeached witnesses were about the only ones who told the exact truth as to the

28 date of construction of the claimant's house. This date is most material because by Weed's own testimony it fixes the

date of his settlement on the land, and, if this occurred on the last of April, instead of February, his residence granting it to have been continuous, could not have exceeded five months at the date he made final proof, September 19, 1885.

The testimony taken at the Akron office is unsatisfactory in some respects. The witnesses nearly all seem to be not only interested by reason of their residence on the land embraced in the entry, but many of them disclose a prejudice against the contestant. Some of them were (indicated) through him for a riot or some breach of the peace in endeavoring to force his removal from the town. They say that his presence was obnoxious on account of his bad character and immoral practices. What these practices consist of is but hinted at in the evidence, and leaves a candid examiner with some suspicion that the true basis of their prejudice is his interference with the entry upon which their property rights are dependent.

It is also shown by the record that the receiver of the office at Akron has some property rights that would be disturbed by the cancellation of this entry. While there is no rule or regulation of this department providing for a change of venue in such case, or the substitution of some other officer not interested in the result of the trial, every consideration of propriety would dictate that one having an interest in the controversy should not be permitted to control or participate in the judgment. Such an exercise of jurisdiction is abhorrent to English and American jurisprudence. In fact, such an interest, *per se*, disqualifies the court from exercising jurisdiction.

When this case was brought before the Akron office, it was the clear duty of the receiver of that office either to have disposed of his interest in the land in controversy, or resign his office of receiver. It will not do for him to say that he does not "feel prejudiced one way or the other." The fact that he had a property interest in the controversy deprives him of jurisdiction to try and determine the case, under all the rules of the common law, and it is more than doubtful whether a statute extending such jurisdiction to a court or other tribunal would stand the test of judicial investigation. See Cooley's Const. Lim., p. 508 *et seq.*

The receiver in this case seems to have been the managing officer of this one-sided investigation, for he attests the signature of
29 twelve out of the fifteen witnesses produced and sworn. There are two questions of practice raised in the record.

It is insisted by claimant's counsel that the motion for review should not be entertained, because not made within thirty days of notice of the decision, contestant claiming that it was made within thirty days of legal notice of the same; that the first notice of the decision was served upon counsel resident in this city, and was not accompanied with a copy of the decision; that afterwards contestant's counsel in Denver was served with a notice of the decision, with a copy thereof attached.

The motion for review was filed within thirty days after receipt of the last notice, but not within thirty days after receipt of the former.

It is not necessary to decide this question, because there is an

affidavit of newly discovered evidence, and although a new hearing is not asked for, in my opinion complete justice can only be subserved by ordering a new hearing to be had. Where a new hearing is ordered, there is no provision as to the time within which a motion should be filed therefor. I shall regard the affidavit of new evidence in the light of an application for a new trial.

Counsel for Weed also claim that the contestant has lost his rights under such application, because he did not move for a new trial immediately upon the discovery of the new evidence, and cite some decision of this department showing that this should be done timely.

This of necessity is within the discretion of the department, and where, as in this case, the new evidence is in the nature of a record, or, at least, not dependent upon the memory of witnesses, the time within which it is presented is not very material.

I am aware that if this entry should be canceled, many titles may be disturbed, and doubtless some innocent purchaser would suffer, but I cannot allow the decision of this department to stand without further investigation, in view of the very doubtful, and even suspicious record before me. You will therefore direct that a new hearing be had, with proper notice to interested parties. Emblen will be allowed to be present, with counsel, if he desires, and this department will detail an efficient agent to represent the interests of the Government in said hearing.

All papers are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*

30 We hereby certify that the above and foregoing is a true and correct copy of the Hon. Secretary's letter of Aug. 25, 1893, as transmitted to this office by the Hon. Commissioner's letter "G," October 30, 1893, and that in accordance with said letter you are hereby notified that we set said case for hearing before this office on the 3d day of January, 1894, at 10 a. m.; that you will appear at said time and place to offer any additional testimony in said case in accordance with Commissioner's instructions herein.

A. J. JOHNSON, *Registrar.*
GEO. C. REED, *Receiver.*

EXHIBIT "C."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *February* 2, 1894.

The honorable the Secretary of the Interior.

SIR: There has been filed in this office House bill No. 5713, entitled "A bill to perfect the title to a quarter section of land in the town of Yuma, Colorado," accompanied by a brief and by several petitions (later described) addressed to the Senators and Representatives in Congress of the State of Colorado, praying for legislation such as is proposed by the said bill, and also accompanied by a letter from Hon. Thos. C. McRae, chairman of the House "Committee on the Public Lands," under date of February 10, 1894, addressed to

you, transmitting "for your consideration" the said bill with request for an "early report thereon and with such suggestions and recommendations in reference thereto as you may see proper to make."

The said bill, with the accompanying petitions, has been carefully considered by me, though not transmitted in the usual manner, and I have now the honor to report to you thereon in duplicate as follows:

The petitions before mentioned are four in number, viz: (1) By George F. Weed; (2) the mayor, the other town officials and common council of the town of Yuma, Colorado; (3) the county judge and county officials of Yuma county, Colorado; (4) and certain lot-owners and residents of the said town of Yuma.

The several petitions purport to give the history of a certain contest proceeding and matter heretofore and now pending in the Land Department of the Government, originally entitled "Emblen *vs.* Weed," and, for reasons alleged in said petition, and in the argument filed to cover them, pray in substance, for legislation withdrawing from this department said "contest" proceeding, the pendency of which is averred to be a "cloud" on titles in said
31 town of Yuma; that patent be directed to issue in order that titles in the said town of Yuma may be quieted, etc.

A complete history of the case of "Emblen *vs.* Weed," and of the cash entry by said Weed, referred to in said petitions—all passed proceedings therein—is to be found reported (on review) in 17 Land Decisions, pages 220–225, and to which reported decision of the department, for brevity, reference is here made for all facts of record relating to the pre-emption cash entry No. 4990 (Denver series) of George F. Weed, implying, thereby, that the "title" to said tract, to the extent represented by the registrar and receiver's final certificate and receipt held by Geo. F. Weed (No. 4990) is now under some "cloud" impairing its integrity and requiring specific legislation by Congress for its removal, whereby Weed, and transferees under him, may be relieved in the premises, but as to what "cloud" rests upon the said "title" of Weed the bill is silent.

Nothing appears in the history of this entry by Geo. F. Weed, to cast any "cloud" upon his "title" (right) to the land covered by his said entry, save specific allegations preferred of fraud and non-compliance with law on the part of said Weed in respect to his said entry, and which allegations, properly brought to the attention of the department, have been made a subject of inquiry by it, in the due execution of the land laws with which his office and the department is charged. In all cases involving a question of right under any of the land laws to any portion of the public lands, the Government is always a necessary party in interest and bound to see compliance with the law in the premises, and it is immaterial whether the question arose in due course at the instance of a third party as a stranger or one seeking a preference right of entry or through the regular action of the authorized agents of the Government.

It cannot be held that any regular proceeding, duly instituted in the Land Department to determine the legality of a given entry of

the public lands in the order of public business is such a "cloud" on the right to a patent for such lands as demands legislative action. If the land be illegally entered—the entry conceived in fraud—no right can attach thereto, under the laws of Congress, by reason of any mere entry thereof.

If charges of illegality and fraud against the cash entry of George F. Weed be not proved, as alleged, the Government cannot without patent to said Weed for the land conveyed by his aforesaid cash entry, and upon the issuance of patent to him, vendees under him would be insured in their title derived through Weed, so far as the United States is concerned. If the entry of Weed should be
32 finally cancelled of record in this office, because fraudulent in inception, the then occupants of subdivisions and lots of the quarter section, formerly covered by the cancelled entry of Weed (the land being used by them for purpose of trade and business, and other required statutory conditions existing) could apply and proceed to effect a town-site entry in the way pointed out in the existing town-site laws of the United States, and as the same may be found applicable. Land occupied for purpose of trade and business would not be subject to homestead entry.

The effect of this bill being to arrest an order passed by the department for a proper proceeding in a matter properly in its jurisdiction by law, the effect of which order can result in no injury to the entryman, Geo. F. Weed, if he be rightfully entitled to the land, and to remove from the department all authority and discretion in the premises, the proposed legislation is not approved.

In view of the reasons given, no report upon the details and methods of the proposed law has been deemed necessary, though it may be said, as to the whole, that no reason is perceived why there should be any departure from the ample methods now provided in the existing town-site laws of the United States for the protection of occupants and inhabitants of towns and cities founded upon public lands, in the event that the pre-emption cash entry No. 4990 of Geo. F. Weed, should be duly canceled.

Very respectfully, S. W. LAMOREAUX,
Commissioner.

EXHIBIT "D."

DEPARTMENT OF THE INTERIOR,
1863–1894. WASHINGTON, *March* 16, 1894.

Hon. Thos. C. McRae, chairman Committee Public Lands, House of Representatives.

SIR: I am in receipt, through your reference with a request for an expression of the views of this department thereon, of House bill No. 5713, "To perfect the title to a quarter section of land in the town of Yuma, Colorado."

It is proposed by the said bill to issue patent upon application by the county judge of the county of Yuma, Colorado, to him, as trustee, for the several use and benefits of the present owner of the S. E. ¼

sec. 22, T. 2 N. R. 43 W. 6th P. M., State of Colorado. Said tract is at present embraced in the pre-emption cash entry made by George F. Weed, on September 19, 1885.

On October 4, 1885, one George F. Emblen began a contest against said entry, which is still pending undetermined in
33 this department, the last order in which was that contained in departmental decision of August 25, 1893 (17 L. D., 220), in which a new hearing was directed for the reasons set forth in said order. By a reference to said departmental decision of August 25, 1893, a full history will be found of the proceedings heretofore had in this matter.

The evident purpose of this bill is to legislate Emblen out of any rights he may have acquired under proceedings heretofore had in the matter of his contest initiated against Weed's entry. I can see no reason for the proposed legislation and join with the Commissioner of the General Land Office in recommending that the same be not passed.

A copy of the report of the Commissioner of the General Land Office on this bill, dated February 21, 1894, is submitted herewith for your information.

In conclusion, I have to state that the hearing ordered by this department in the decision referred to was suspended until a new receiver should be appointed at the Akron land office, which office has been recently filled, and the adjudication of the case will be proceeded with without delay.

Very respectfully,

(Signed) HOKE SMITH, *Secretary.*

Indorsed: Filed Mar. 6, 1899. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, at the regular November term of said court, and on the 10th day of April, 1899, the following proceedings were had and done in said case, as appear of record in the journal of the proceedings of said court had on said day, to wit:

GEORGE F. EMBLEN
vs.
LINCOLN LAND COMPANY ET AL. } 93, "T."

Upon application of respondents' solicitors, it is ordered by the court that leave be, and the same hereby is, granted respondents to plead herein within five (5) days from and after this date.

Thereupon afterwards, to wit, on the 10th day of April, 1899, demurrer of Ida B. Weed *et al.* was filed in said case, which said demurrer is in words and figures following, to wit:

34 In the Circuit Court of the United States in and for the District of Nebraska.

GEORGE F. EMBLEN
vs.
IDA B. WEED, LINCOLN LAND COMPANY, ET AL., Def'ts.

The demurrers of Ida B. Weed, Lincoln Land Company, C. Armstrong, Jacob Huber, by John Furgeson, as administrator; M. E. Spaulding, E. A. Berdsall, A. W. Field, H. H. Walrod, defendants, to the bill of complaint of Geo. F. Emblen, plaintiff.

These defendants, each by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true, in such manner and form as the same are therein set forth or alleged, do*es* demur thereto, and for cause of demurrer shows that the said plaintiff has not, in and by his said bill, made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought or prayed for, from, or against these defendants — demand the judgment of this honorable court, whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

J. W. DEWEESE,
Solicitor for Defendant-.

F. E. BISHOP, *Of Counsel.*

Indorsed: Filed Apr. 10, 1899. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the 23rd day of June, 1899, opinion of Judge Shiras was filed in said case; which said opinion is in words and figures following, to wit:

In United States Circuit Court, District of Nebraska, May Term, A. D. 1899.

GEORGE F. EMBLEN
vs.
THE LINCOLN LAND COMPANY, GEORGE F. WEED, ET AL. } Equity.

Submitted on demurrer to amended bill of complaint.
T. J. Mahoney, E. R. Duffie, for complainant.
J. W. Deweese, F. E. Bishop, for defendants.

SHIRAS, *District Judge*:

In the bill demurred to, it is averred that on September 19th, 1885, one George F. Weed made a cash pre-emption entry of the southeast quarter of section twenty-two, township two north, of range
35 forty-eight west at the land office of the United States in the city of Denver, Colorado; that on the 4th day of October, 1888, the complainant entered a contest against this entry on the

ground that the entryman, Weed, had not complied with the requirements of the law in respect to his residence on the premises, and that in fact the entry was made for speculative purposes, the intent being to establish a town thereon; that the purpose of complainant in making such contest was not only that the laws of the United States regulating cash pre-emption entries on the public lands should be complied with on part of said Weed, but that by defeating the entry made by Weed, the complainant might be enabled to enter the land under the provisions of section two of chapter eighty-nine of the laws of the United States, approved May 14, 1880, 21 Statutes at Large, 140, which section reads as follows:

"SECTION 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead or timber-culture entry, he shall be notified by the registrar of the land office of the district in which the land is situated, of such cancellation and shall be allowed thirty days from the date of such notice to enter said lands; provided that said registrar shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant and not to be reported."

It is further averred in the bill, that a hearing upon the contest made by complainant against the entry made by Weed was had before the registrar and receiver of the land office at Denver who, on May 21st, 1889, ordered a dismissal of the contest on the ground that the allegations on which the same was based were not sustained by the evidence; that thereupon the contestant, being the complainant herein, appealed to the Commissioner of the General Land Office at Washington, as he had the right to do and upon the hearing of the appeal the Commissioner sustained the same; that thereupon George F. Weed, moved before the Commissioner for a rehearing on the evidence and the officials and inhabitants of the town of Yuma, which it was shown had been located on the premises, asked leave to intervene for the protection of their rights; that the Commissioner ordered a rehearing of the matter before the registrar and receiver; that before this rehearing was had a new land district was created at Akron, Colorado, the land in question being within the new district thus created; that the receiver and registrar of the new district ordered the rehearing to take place at Akron, on the 16th day of September, 1890; that the contestant did not appear at this time, but filed objections to the jurisdiction of the local officers at Akron, averring that the receiver at Akron was an interested party,
being the owner of a part of the town of Yuma under
36 title derived from Weed, the pre-emption claimant; that the
officers of the land district of Akron overruled the objections to the jurisdiction and upon hearing the evidence adduced on behalf of Weed, found in his favor and dismissed the contest; that thereupon complainant appealed to the General Land Office at Washington and the Commissioner affirmed the action of the local land office, from which ruling complainant further appealed to the Secretary of the Interior, John W. Noble, by whom the action of the local officers and of the Commissioner was affirmed by a decision entered January 9th, 1893, and subsequently complainant

filed a motion for review, before Secretary Smith, upon the hearing of which it was ordered by the Secretary of the Interior that a rehearing of the whole contest should be had before the local officers and in obedience to this order the register and receiver of the land office at Akron set the case for hearing on the 3rd day of January, 1894, at which time Weed and the parties interested obtained a continuance of the hearing, it being charged in the bill that this continuance was obtained for the purpose of procuring the passage of an act of Congress confirming the title of the original entryman George F. Weed, which act was in fact passed and approved December 29th, 1894, the same being in the words following:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled: That the preemption cash entry numbered 4990 of George F. Weed, made at the district land office, at Denver, Colorado, on the 19th day of September, 1885, for the southeast quarter of section twenty-two (22) township two (2) north of range forty eight (48) west, which tract embraces the town of Yuma, Colorado, the county-seat of Yuma county, Colorado, be and the same is hereby confirmed and that patents of the United States issue therefor to the said Weed."

Complainant further avers that while this bill was pending before the houses of Congress, full information was furnished them of the exact status of the contest over the title to the land; that when the bill was passed, the question of the title thereto was pending in the Land Department, which, under the Constitution and laws of the United States, is solely charged with the duty of determining the rights of (*pre-emption*) and contestants and that Congress had no right or power to adjudicate on the question of the title to the premises in dispute and furthermore, that under the provisions of section two of the act of Congress of May 14th, 1880, hereinbefore cited, complainant had a vested right to enter the land upon the determination of the contest then pending between himself and Weed,
37 and that if complainant had been permitted to carry through the contest to a final determination he would have succeeded in procuring a cancellation of the Weed entry, and that the passage of the act of Congress above cited, and the issuance of the patents thereunder, deprived complainant of a vested right without due process of law; it is also averred in the bill that in the year 1886, the town of Yuma was located on part of the premises and a large number of lots have been sold to various parties named as defendants to the bill, it being charged that these parties had full knowledge of the facts when they bought under the titles based on the Weed entry.

The prayer of the bill in substance is that the several defendants be decreed to hold the title to the property in trust for the use and benefit of complainant, and that it be decreed that the patent issued under the act of Congress to George F. Weed conveyed no title in the premises as against the rights of complainant.

To this amended bill, a demurrer is interposed on behalf of the principal defendants, thereby presenting the question whether the

matters recited in the bill entitled the complainant to any relief in the premises.

The bill admits that the legal title to the land has never vested in the complainant and that by virtue of the patents issued under the provisions of the act of Congress, adopted December 29th, 1894, the title to the realty has passed to the defendants, but the contention of complainant is that the act of Congress is unconstitutional and void for two reasons: First: that as the contest over the title to the land was pending before the Land Department, Congress had no jurisdiction over the land and could not confirm the entry made by Weed; and second: that by initiating the contest over the validity of the Weed entry and by payment of the costs and expenses incurred in making the contest complainant had obtained a vested right or interest in the land of which he could not be deprived by legislative action.

The denial of the power of Congress to confirm the entry made by Weed because of the pending of the contest before the Land Department seems to be based in the allegations of the bill upon the assumption that under the Constitution and laws of the United States the Land Department is solely charged with the duty of determining the rights of pre-emptors and contestants and therefore Congress cannot legislate with respect thereto.

In view of the fact that the different branches of the Land Department are the creation of Congress and not of the Constitu-
38 tion, it must certainly be true that the paramount control over the disposition of the public lands of the United States remains in Congress and the mere fact that a contest was pending before the tribunal created by Congress to hear and determine the same did not nullify this paramount control bestowed by the Constitution itself upon Congress to dispose of the public lands belonging to the United States; it is within the power of Congress to terminate the existence of the Land Department or to declare that it shall no longer exercise jurisdiction over contests pertaining to the right to enter or pre-empt any of the public domain and when Congress passed the act of December 29, 1894, it in effect declared that the jurisdiction of the Land Department over the question of the validity of the Weed entry was at an end. It cannot be questioned that it is within the power of Congress to change or terminate the jurisdiction of the district or circuit courts over given subjects, and in the absence of a saving clause in the act, jurisdiction over pending cases ceases upon the taking effect of the act. Insurance Company *vs.* Ritchie, 5 Wall., 541; Baltimore & Potomac R. R. *vs.* Grant, 98 U. S., 398; Gurpee *vs.* Patrick Co., 137 U. S., 141.

The same effect must be given to a statute which intends to put an end to further contest over a disputed title. Thus, *In re* Hall, 167 U. S., 38, it appeared that acting under authority previously conferred on it by Congress the Court of Claims had rendered judgment in favor of one Hall against the District of Columbia for the sum of $8,644.19, with interest thereon from January 1st, 1877. Upon appeal to the Supreme Court it was held that there was error in the matter of allowing interest from that date and the judgment

was reversed and the case was remanded to the Court of Claims for correction of this error. The mandate was filed in that court, but before a new judgment had been entered in conformity with the opinion of the Supreme Court, Congress passed an act depriving the Court of Claims of jurisdiction, and the Supreme Court held that "the effect of the passage of the repealing act was to take away the jurisdiction of the Court of Claims to proceed further in those cases which were founded upon the act thus repealed. This the Congress had the power to do."

The general rule applicable in cases of this character is laid down by the Supreme Court in Frisbie *vs.* Whitney, 9 Wall., 187, in which it is held that except in cases of vested rights the power of Congress to control the disposition of the public lands is absolute, and the contention of complainant that the control of Congress over the disposition of the land in dispute had ceased to exist, because there was pending before the officers of the Land Department a contest over the validity of the Weed entry cannot be sustained.

39 Do the facts averred in the bill show that complainant had obtained such a vested right in or to the land in dispute that thereby the same had ceased to be within the control of Congress; a vested right of such a character that the court can enforce it by a decree conveying the title of the land to complainant? The history of the case, as recited in the bill, shows that the decision of the registrar and receiver at Akron, dismissing complainant's contest and affirming the validity of the Weed entry, had, upon appeal, been confirmed by the Commissioner at Washington and on appeal had been finally confirmed by the Secretary of the Interior, John W. Noble, under date of January 9th, 1893.

The averments of the bill further show that after John W. Noble had been succeeded in office by Secretary Smith a petition for a review of the order made by Secretary Noble was filed in the office of the Secretary of the Interior and was by him entertained and granted and the case was sent back to the local land office for a further hearing on the facts. What effect upon the rights of the parties had this order granted by Secretary Smith, whereby it was sought to nullify and set aside the final judgment of the Land Department upon the question of the validity of the Weed entry evidenced by the order of Secretary Noble confirming on appeal the action of the Commissioner of the General Land Office, which in turn confirmed the decision and findings of the registrar and receiver? Is it open to each succeeding Secretary of the Interior to rehear cases decided by his predecessor in office? In Noble *vs.* Logging Company, 147 U. S., 165, it is said, "A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without due process of law and was therefore void. As was said by Mr. Justice Grier, in United States *vs.* Stone, 2 Wall., 525, one officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of a court." It is clear from the averments of the bill that the complainant has never yet succeeded in obtaining an adjudication holding that the Weed entry is invalid,

but, as already stated, it is shown that up to this time the adjudications of the Land Department have sustained the validity of the Weed entry.

If it be held that it was open to Secretary Smith to annul the finding and decision of his predecessor in office and to send the case back to the local land office for a rehearing upon the facts, yet as the local officers have not taken further action, there is no decision holding the Weed entry to be invalid and until that is done, no right exists in complainant to make entry of the land and thereby acquire an interest in the same. Under the provisions of the act of Congress of May 14, 1880, upon which complainant relies, before a contestant becomes entitled to enter land he must procure a cancellation of the pre-emption or other entry which he contests and until this is done, no right to make entry thereof exists in his behalf. The complainant herein does not aver that he has ever succeeded in obtaining a cancellation of the Weed entry, but on the contrary the facts averred in the bill show that this entry yet remains uncancelled. The real contention of the complainant is that if he had been permitted to continue the contest in the Land Department he would have succeeded in obtaining a cancellation of the entry, and that Congress had no right to terminate the jurisdiction of the Land Department and thus deprive him of the privilege of continuing the litigation over the validity of the Weed entry. By filing the present bill the complainant practically admits that the jurisdiction of the Land Department over the matter is at an end and therefore complainant now appeals to the court upon the theory that he has such a vested interest in the land that he is entitled to a decree conveying to him the legal title of the premises and cites the cases of United States *vs.* Fitzgerald, 15 Peters, 407; Smith *vs.* United States, 10 Peters, 330; Delassure *vs.* United States, 9 Peters, 133, and McGarn *vs.* Segal, 92 Fed. Rep., 252, in support of his contention, but an examination of these cases shows that none of them give support to the rule contended for by complainant. As is pointed out in Frisbie *vs.* Whitney, 9 Wall., 187–196, "the courts may very properly correct the injustice done by the land officers, in refusing to accord rights, however inchoate, which are protected by laws still in existence, while they can only consider vested rights when those rights are sought to be enforced in opposition to the repeal or modification of the laws on which they are founded; the argument is urged with much zeal that because complainant did all that was in the power of any one to do towards perfecting his claims, he should not be held responsible for what could not be done. To this we reply, as we did in the case of Rector *vs.* Ashby (6 Wall., 142), that the rights of a claimant are to be measured by the acts of Congress and not by what he may or may not be able to do, and if a sound construction of these acts shows that he acquired no vested interest in the land then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient."

The act of Congress upon which complainant relies in this case conferred upon him the privilege of entering the land in dispute

when and only when he should succeed in cancelling the prior entry in favor of Weed. This he has not yet succeeded in doing.

41 He entered the contest against Weed in October, 1886, but never obtained a cancellation of the entry, the decisions of the Land Department being adverse to him until in December, 1894, Congress passed an act confirming the Weed entry and thus made it impossible for the Land Department to further entertain the contest over the validity of the Weed entry. That entry, therefore, remains uncancelled, and therefore a right to enter the land has never become vested in the complainant.

He has never made an entry upon the land, nor has he perfected a right to make an entry thereof by securing a cancellation of the Weed entry and therefore he has no vested right or interest in the land of which he can avail himself to defeat the operation of the act of Congress confirming the Weed entry. Some reliance is placed, in argument, upon the fact that complainant has paid the costs of the contest and certain fees to Land Department officials. These payments were made with full knowledge of the fact that they would not affect the right of the land unless the Weed entry was cancelled.

The payments were not made with the expectation that by reason thereof, the Land Department would convey the title to the complainant, but they were made in aid of the contest which complainant initiated against the Weed entry, and complainant well knew that these payments would not give him any right to enter the land unless he succeeded in procuring a cancellation of the previous entry made by Weed, and as he has failed in his effort to procure a cancellation of this entry, he has not established a right to enter the land by the mere payment of the costs and fees.

Under the act of May 14, 1880, it is the procurement of a cancellation of a previous entry and the payment of the Land Office fees that creates the right to a preference in the entry of the land upon part of the contestant. A performance of one only of the conditions is not sufficient.

Both conditions are essential in the creation of the right; the complainant admits that he has not secured the cancellation of the Weed entry and therefore has failed to show that he has become entitled to enter the land; he never has entered the same and therefore has no right in the land. He has not perfected a right to enter the land, having failed to secure a cancellation of the Weed entry, and therefore there is no ground shown upon which the court could base a decree that the defendants hold the legal title for his benefit. The utmost he can claim in view of the facts recited in the bill, is that if he had been permitted to prolong the contest over the

42 Weed entry, before the Land Department, he might have succeeded in ultimately procuring a cancellation of the entry, but this court cannot accept, as ground for its action, a possibility of this kind, in view of the requirements of the act of Congress that the contestant must succeed in procuring a cancellation of the existing entry, before he becomes entitled to create a right in the land by making entry thereof.

The demurrer is therefore sustained and the amended bill is dismissed on the merits, at the costs of complainant.

Indorsed: Filed June 23, 1899. Oscar B. Hillis, clerk, by R. C. Hoyt, deputy.

Thereupon afterwards, to wit, at the May term, 1899, of said court, and on the 26th day of June, 1899, the following proceedings were had and done in said case, as appear of record on the journal of the proceedings of said court had on said day, to wit:

GEORGE F. EMBLEN, Complainant,
vs.
THE LINCOLN LAND COMPANY ET AL., Defendants.

The demurrer to the amended bill herein, having been heretofore fully argued by the solicitors for the respective parties, duly submitted and taken under advisement,

Now, after due consideration thereof, and being fully advised in the premises, the court finds upon the issues in favor of the defendants.

It is therefore, ordered, adjudged and decreed that said demurrer be sustained, and that the amended bill be and hereby is dismissed on the merits at the costs of complainant.

Thereupon afterwards, to wit, on the 13th day of July, 1899, assignment of errors was filed in said case, which said assignment of errors is in words and figures following, to wit:

43 In the Circuit Court of the United States for the District of Nebraska.

GEORGE F. EMBLEN, Complainant.
vs.
THE LINCOLN LAND COMPANY, GEORGE F. WEED, IDA B. WEED, R. von Horrum Schramm, Viola Abbott, C. Armstrong, Mrs. S. A. Churchill, J. F. Heiserman, Mrs. A. M. Herr, P. F. Huber, Christ Klein, August Muntzing, J. W. Sheedy, M. E. Spaulding, M. L. Thomas, T. J. Tuttle, Mrs. S. J. Wilms, F. M. Adams, E. A. Berdsall, Amos Binford, Josephine Brown, T. B. Babcock, G. W. Dobler, B. F. Durham, A. W. Fields, Alex. Haldan, James Kerr, A. A. McKean, A. F. Meyer, E. J. Picard, M. W. Peck, Reed Brothers, W. A. Sheedy, P. H. Shea, Dennis Shea, A. N. Turney, F. J. Tuttle, H. H. Walrod, and The Town of Yuma, Defendants.

Assignment of Errors.

Comes now the said complainant, George F. Emblen, and shows that there is manifest error, prejudicial to said complainant, in the judgment, order and decree entered in the above-entitled cause in this court aforesaid, in this, to wit:

1st. That the court erred in sustaining the demurrer of the defendants to the amended bill of complaint filed in said cause by this complainant.

2nd. That the court erred in dismissing the amended bill of complaint filed in said cause by this complainant on the merits and at the cost of complainant.

3rd. That the court erred in not overruling the demurrer of the defendant- to complainant's amended bill of complaint filed in said cause.

4th. That the court erred in not entering a decree in favor of complainant for the relief prayed for in complainant's amended bill of complaint.

T. J. MAHONEY,
Solicitor for Complainant.

E. R. DUFFIE, *Of Counsel.*

Indorsed: Filed Jul- 13, 1899. Oscar B. Hillis, clerk, by R. C. Hoyt, deputy.

Thereupon afterwards, to wit: on the 13th day of July, 1899, petition for appeal and order allowing same *was* filed in said case, which said petition and order *is* in words and figures following, to wit:

44 In the Circuit Court of the United States for the District of Nebraska.

GEORGE F. EMBLEN, Complainant,
vs.
THE LINCOLN LAND COMPANY, GEORGE F. WEED, IDA B. WEED, R. von Horrum Schramm, Viola Abbott, C. Armstrong, Mrs. S. A. Churchill, J. F. Heiserman, Mrs. A. M. Herr, P. F. Huber, Christ Klein, August Muntzing, J. W. Sheedy, M. E. Spaulding, M. L. Thomas, T. J. Tuttle, Mrs. S. J. Wilms, F. M. Adams, E. A. Berdsall, Amos Binford, Josephine Brown, T. B. Babcock, G. W. Dobler, B. F. Durham, A. W. Fields, Alex. Haldan, James Kerr, A. A. McKean, A. F. Meyer, E. J. Picard, M. W. Peck, Reed Brothers, W. A. Sheedy, P. H. Shea, Dennis Shea, A. N. Turney, F. J. Tuttle, H. H. Walrod, and The Town of Yuma, Defendants.

Petition for Appeal.

The above-named complainant, George F. Emblen, conceiving himself aggrieved by the order and decree entered in said cause at the May, 1899, term of said court, whereby the court sustained the demurrer of the defendants to the amended bill of this complainant and directed a dismissal of said amended bill on the merits and at the costs of the complainant, doth hereby appeal from said order and decree to the United States circuit court of appeals for the eighth circuit, and he prays that this, his appeal, may be allowed and that a transcript of the record and proceedings and papers and

evidence upon which said order and decree was made may be duly authenticated and sent to the United States circuit court of appeals for the eighth circuit.

T. J. MAHONEY,
Solicitor for Complainant.

E. R. DUFFIE, *Of Counsel.*

And now, to wit: on this 12th day of July, 1899, it is ordered that the appeal be allowed as prayed for and that the bond on appeal is fixed at the sum of $250.00.

W. H. MUNGER, *Judge.*

Indorsed: Filed July 13th, 1899. Oscar B. Hillis, clerk, by R. C. Hoyt, deputy.

Thereupon afterwards, to wit: on the 2nd day of August, 1899, appeal bond was filed in said case, which said appeal bond is in words and figures following, to wit:

45 In the Circuit Court of the United States for the District of Nebraska.

GEORGE F. EMBLEN, Complainant,
vs.
THE LINCOLN LAND COMPANY, GEORGE F. WEED, Ida B. Weed, R. von Horrum Schramm, Viola Abbott, C. Armstrong, Mrs. S. A. Churchill, J. F. Heiserman, Mrs. A. M. Herr, P. F. Huber, Christ Klein, August Muntzing, J. W. Sheedy, M. E. Spaulding, M. L. Thomas, T. J. Tuttle, Mrs. S. J. Wilms, F. M. Adams, E. A. Berdsall, Amos Binford, Josephine Brown, T. B. Babcock, G. W. Dobler, B. F. Durham, A. W. Fields, Alex. Haldan, James Kerr, A. A. McKean, A. F. Meyer, E. J. Picard, M. W. Peck, Reed Brothers, W. A. Sheedy, P. H. Shea, Dennis Shea, A. N. Turney, F. J. Tuttle, H. H. Walrod, and The Town of Yuma, Defendants. } Appeal Bond.

Know all men by these presents that we, George F. Emblen, as principal, and John E. Emblen, as surety, are held and firmly bound unto the Lincoln Land Company, George F. Weed, Ida B. Weed, R. von Horrum Schramm, Viola Abbott, C. Armstrong, Mrs. S. A. Churchill, J. F. Heiserman, Mrs. A. M. Herr, P. F. Huber, Christ Klein, August Muntzing, J. W. Sheedy, M. E. Spaulding, M. L. Thomas, T. J. Tuttle, Mrs. S. J. Wilms, F. M. Adams, E. A. Berdsall, Amos Binford, Josephine Brown, T. B. Babcock, G. W. Dobler, B. F. Durham, A. W. Fields, Alex. Haldan, James Kerr, A. A. McKean, A. F. Meyer, E. J. Picard, M. W. Peck, Reed Brothers, W. A. Sheedy, P. H. Shea, Dennis Shea, A. N. Turney, F. J. Tuttle, H. H. Walrod, and the Town of Yuma, in the full sum of $250.00, to be

paid to the said respondents in said cause, their heirs, executors, administrators or assigns, and which, well and truly to be paid, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 19th day of July, in the year of our Lord eighteen hundred and ninety-nine.

Whereas lately, at the May, 1899, term of the circuit court of the United States for the district of Nebraska, in a suit pending in said court between the said George F. Emblen complainant and the said Lincoln Land Company, George F. Weed, Ida B. Weed, R. von Horrum Schramm, Viola Abbott, C. Armstrong, Mrs. S. A. Churchill, J. F. Heiserman, Mrs. A. M. Herr, P. F. Huber, Christ Klein, August Muntzing, J. W. Sheedy, M. E. Spaulding, M. L. Thomas, T. J. Tuttle, Mrs. S. J. Wilms, F. M. Adams, E. A. Berdsall, Amos Binford, Josephine Brown, T. B. Babcock, G. W. Dobler, B. F. Durham, A. W. Fields, Alex. Haldan, James Kerr, A. A. McKean,
46 A. F. Meyer, E. J. Picard, M. W. Peck, Reed Brothers, W. A. Sheedy, P. H. Shea, Dennis Shea, A. N. Turney, F. J. Tuttle, H. H. Walrod and The Town of Yuma, respondents, decree was rendered against the said George F. Emblen, and the said George F. Emblen has obtained an appeal to said court to reverse the decree in the aforesaid suit and a citation directed to the said respondents, citing and admonishing them to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the said citation.

Now, therefore, the condition of the above obligation is such that if the said George F. Emblen shall prosecute said appeal to effect, and pay all damages and costs if he should fail to make good his appeal, then the above obligation to be void, otherwise to be and remain in full force and effect.

GEO. F. EMBLEN.
JOHN E. EMBLEN.

Approved by—
WM. H. MUNGER, *Judge*.

Aug. 2nd, 1899.

Indorsed: Filed Aug. 2, 1899. Oscar B. Hillis, clerk, by R. C Hoyt, deputy.

Thereupon afterwards, to wit, on the 5th day of August, 1899, a citation was duly signed in said case, and returned and filed on the 10th day of August, 1899, with acceptance of service endorsed thereon, the following of which is the original:

The United States of America to the Lincoln Land Company, George F. Weed, Ida B. Weed, R. von Horrum Schramm, Viola Abbott, C. Armstreng, Mrs. S. A. Churchill, J. F. Heiserman, Mrs. A. M. Herr, P. F. Huber, Christ Klein, August Muntzing, J. W. Sheedy, M. E. Spaulding, M. L. Thomas, T. J. Tuttle, Mrs. S. J. Wilms, F. M. Adams, E. A. Berdsall, Amos Binford, Josephine Brown, T. B. Babcock, G. W. Dobler, B. F. Durham, A. W. Fields, Alex. Haldan, James Kerr, A. A. McKean, A. F. Meyer, E. J. Picard, M. W. Peck, Reed Brothers, W. A. Sheedy, P. H. Shea, Dennis Shea, A. N. Turney, F. J. Tuttle, H. H. Walrod, and the Town of Yuma, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed, filed in the clerk's office of the circuit court of the United States for the
47 district of Nebraska, wherein George F. Emblen is appellant, and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable W. H. Munger, judge of the circuit court of the United States for the district of Nebraska, this 5th day of August, in the year of our Lord one thousand eight hundred and ninety-nine.

W. H. MUNGER,
United States District Judge for the District of Nebraska.

Service acknowledged this 8th day of August, 1899.

J. W. DEWEESE AND
F. E. BISHOP,
Att'ys for the Defendants, Who Have Been Personally Served with Summons.

No. 93, T. United States circuit court, district of Nebraska. George F. Emblen *vs.* Lincoln Land Co. *et al.* Citation and acceptance of service. Filed Aug. 10, 1899. Oscar B. Hillis, clerk, by R. C. Hoyt, deputy clerk.

UNITED STATES OF AMERICA, }
District of Nebraska, } *ss:*

I, Oscar B. Hillis, by R. C. Hoyt, deputy clerk of the circuit court of the United States for the district of Nebraska, do hereby certify that the foregoing pages from one (1) to seventy-one (71), inclusive, contains true and faithful transcripts of the pleadings, process and proceedings of record and on file in said court, in the case of George F. Emblen *vs.* The Lincoln Land Company *et al.*, No. 93 doc. "T," and that a copy of the citation duly certified has been lodged and remains in my said office as such clerk.

Seal United States Circuit Court, District of Nebraska.

Witness my hand and the seal of said circuit court at Omaha in said district, this 23rd day of August, A. D. 1899.

OSCAR B. HILLIS, *Clerk*,
By R. C. HOYT, *Deputy Clerk*.

[Cancelled 10c. U. S. rev. stamp]

Filed Sep. 4, 1899.

JOHN D. JORDAN, *Clerk*.

48 And on the sixteenth day of September, A. D. 1899, an appearance of counsel for the appellant was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

GEORGE F. EMBLEN, Appellant,
vs.
THE LINCOLN LAND CO. ET AL. } No. 1315.

The clerk will enter *my* appearance as counsel for the appellant.

E. R. DUFFIE.
T. J. MAHONEY.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1899. No. 1315. George F. Emblen, appellant, *vs.* The Lincoln Land Company *et al.* Appearance. Filed Sep. 16, 1899. John D. Jordan, clerk. E. R. Duffie, T. J. Mahoney, counsel for appellant.

And on the twelfth day of October, A. D. 1899, an appearance of counsel for appellees was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

GEORGE F. EMBLEN, Appellant,
vs.
LINCOLN LAND COMPANY ET AL. } No. 1315.

The clerk will enter *my* appearance as counsel for the appellees.

J. W. DEWEESE AND
F. E. BISHOP.

49 Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1899. No. 1315. George F. Emblen, appellant, *vs.* Lincoln Land Company *et al.* Appearance. Filed Oct. 12, 1899. John D. Jordan, clerk. J. W. Deweese, F. E. Bishop, counsel for appellees.

And on the nineteenth day of January, A. D. 1900, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

FRIDAY, *January* 19, 1900.

GEORGE F. EMBLEN, Appellant,
vs.
THE LINCOLN LAND COMPANY ET AL. } No. 1315.

Appeal from the circuit court of the United States for the district of Nebraska.

This cause having been called for hearing in its regular order, the same was argued by Mr. T. J. Mahoney in behalf of the appellant and by Mr. J. W. Deweese for the appellees.

Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the sixteenth day of April, A. D. 1900, an opinion of said United States circuit court of appeals for the eighth circuit was filed in said cause in the following words, to wit:

50 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1899.

GEORGE F. EMBLEN, Appellant,
vs.
THE LINCOLN LAND COMPANY ET AL., Appellees. } No. 1315. Appeal from the Circuit Court of the United States for the District of Nebraska.

Mr. T. J. Mahoney (Mr. E. R. Duffie was with him on the brief) for appellant.

Mr. J. W. Deweese (Mr. T. E. Bishop was with him on the brief) for appellees.

Before Caldwell, Sanborn, and Thayer, circuit judges.

Per Curiam:

George F. Emblen filed his bill of complaint in the circuit court against George F. Weed and others, the object of which was to divest out of the defendant, Weed, the legal title to certain lands acquired by him under a patent from the United States, issued in pursuance of an act of Congress, and vest the title thereto in the complainant, and for other relief. The circuit court sustained a demurrer to the bill, and the complainant appealed. Upon a full consideration of the record and arguments at the bar, and briefs of counsel, we find the opinion of Judge Shiras (94 Fed. Rep., 710), who ruled the case at the circuit, contains an accurate statement of the case made by

the bill, and as his opinion sustaining the demurrer to the bill expresses the law of the case, we adopt the same as the opinion of the court.

"SHIRAS, *District Judge:*

"In the bill demurred to it is averred that on September 19, 1885, one George F. Weed made a cash pre-emption entry of the S. E. ¼ of section 22, township 2 N. of range 48 west, at the *the* land office of the United States in the city of Denver, Colo.; that on the 4th day of October, 1888, the complainant entered a contest against this entry on the ground that the entryman, Weed, had not complied with the requirements of the law with respect to his residence on the
51 premises, and that in fact the entry was made for speculative purposes, the intent being to establish a town thereon; that the purpose of complainant in making such contest was not only that the laws of the United States regulating cash pre-emption entries on the public lands should be complied with on part of said Weed, but that, by defeating the entry made by Weed, the complainant might be enabled to enter the land under the provisions of section 2 of chapter 89 of the Statutes of the United States, approved May 14, 1880 (21 Stat., 140); which section reads as follows:

"'SEC. 2. In all cases where any person has contested, paid the Land Office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from the date of such notice to enter said lands: Provided, that said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported.'

"It is further averred in the bill that a hearing upon the contest made by complainant against the entry made by Weed was had before the register and receiver of the land office at Denver, who, on May 21, 1889, ordered a dismissal of the contest, on the ground that the allegations on which the same was based were not sustained by the evidence; that thereupon the contestant, being the complainant herein, appealed to the Commissioner of the General Land Office at Washington, as he had the right to do, and upon the hearing of the appeal the Commissioner sustained the same; that thereupon George F. Weed moved before the Commissioner for a rehearing on the evidence, and the officials and inhabitants of the town of Yuma, which it was shown had been located on the premises, asked leave to intervene for the protection of their rights; that the Commissioner ordered a rehearing of the matter before the register and receiver; that before this rehearing was had a new land district was created at Akron, Colo., the land in question being within the new district thus created; that the receiver and register of the new district ordered the rehearing to take place at Akron on the 16th day of September, 1890; that the contestant did not appear at this time, but filed objections to the jurisdiction of the local offices at Akron, averring that the receiver at Akron was an interested party, being the owner of a part of the town of Yuma under

title derived from Weed, the pre-emption claimant; that the officers of the land district of Akron overruled the objections to the jurisdiction, and, upon hearing the evidence adduced on behalf of Weed, found in his favor, and dismissed the contest; that thereupon complainant appealed to the General Land Office at Washington, and the Commissioner affirmed the action of the local land office, from which ruling complainant further appealed to the Secretary of the Interior, John W. Noble, by whom the action of the local officers and of the Commissioner was affirmed by a decision entered January 9, 1893, and subsequently complainant filed a motion for review before Secretary Smith, upon the hearing of which it was ordered by the Secretary of the Interior that a rehearing of the whole contest should be had before the local officers, and, in obedience to this order, the register and receiver of the
52 land office at Akron set the case for hearing on the 3d day of January, 1894, at which time Weed and the parties interested obtained a continuance of the hearing, it being charged in the bill that this continuance was obtained for the purpose of procuring the passage of an act of Congress confirming the title of the original entryman, George F. Weed, which act was in fact passed and approved December 29, 1894 (28 Stat., 599), the same being in the words following:

"'Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the pre-emption cash entry numbered 4990, of George F. Weed, made at the district land office at Denver, Colorado, on the 19th day of September, 1885, for the southeast quarter of section twenty-two (22), township two (2), north, of range forty-eight (48) west, which tract embraces the town of Yuma, Colorado, the county-seat of Yuma county, Colorado, be, and the same is hereby, confirmed, and that patent of the United States issue therefor to the said Weed.'

"Complainant further avers that, while this bill was pending before the houses of Congress, full information was furnished them of the exact status of the contest over the title to the land; that, when the bill was passed, the question of the title thereto was pending in the Land Department, which, under the Constitution and laws of the United States, is solely charged with the duty of determining the rights of pre-emption and contestants, and that Congress had no right or power to adjudicate on the question of the title to the premises in dispute, and, furthermore, that, under the provisions of section 2 of the act of Congress of May 14, 1880, hereinbefore cited, complainant had a vested right to enter the land upon the determination of the contest then pending between himself and Weed, and that, if complainant had been permitted to carry through the contest to a final determination, he would have succeeded in procuring a cancellation of the Weed entry, and that the passage of the act of Congress above cited and the issuance of the patents thereunder deprived complainant of a vested right without due process of law. It is also averred in the bill that in the year 1886 the town of Yuma was located on part of the premises, and a large number of lots have been sold to various parties named as defend-

ants to the bill, it being charged that these parties had full knowledge of the facts when they bought under the titles based on the Weed entry. The prayer of the bill, in substance, is that the several defendants be decreed to hold the title to the property in trust for the use and benefit of complainant, and that it be decreed that the patent issued under the act of Congress to George F. Weed conveyed no title in the premises, as against the rights of complainant. *To this amended* bill a demurrer is interposed on behalf of the principal defendants, thereby presenting the question whether the matters recited in the bill entitle the complainant to any relief in the premises. The bill admits that the legal title to the land has never vested in the complainant, and that, by virtue of the patents issued under the provisions of the act of Congress adopted December 29, 1894, the title to the realty has passed to the defendants; but the contention of complainant is that the act of Congress is unconstitutional and void for two reasons: First, that, as the contest over the title to the land was pending before the Land Department,
53 Congress had no jurisdiction over the land, and could not confirm the entry made by Weed; and, second, that by initiating the contest over the validity of the Weed entry, and by payment of the costs and expenses incurred in making the contest, complainant had obtained a vested right or interest in the land of which he could not be deprived by legislative action. The denial of the power of Congress to confirm the entry made by Weed, because of the pending of the contest before the Land Department, seems to be based in the allegations of the bill upon the assumption that, under the Constitution and laws of the United States, the Land Department is solely charged with the duty of determining the rights of pre-emptors and contestants, and therefore Congress cannot legislate with respect thereto. In view of the fact that the different branches of the Land Department are the creation of Congress, and not of the Constitution, it must certainly be true that the paramount control over the disposition of the public lands of the United States remains in Congress, and the mere fact that a contest was pending before the tribunal created by Congress to hear and determine the same did not nullify this paramount control bestowed by the Constitution itself upon Congress to dispose of the public lands belonging to the United States. It is within the power of Congress to terminate the existence of the Land Department, or to declare that it shall no longer exercise jurisdiction over contests pertaining to the right to enter or pre-empt any of the public domain, and when Congress passed the act of December 29, 1894, it in effect declared that the jurisdiction of the Land Department over the question of the validity of the Weed entry was at an end. It cannot be questioned that it is within the power of Congress to change or terminate the jurisdiction of the district or circuit courts over given subjects, and, in the absence of a saving clause in the act, jurisdiction over pending cases ceases upon the taking effect of the act. Insurance Co. *v.* Ritchie, 5 Wall., 541; Railroad *v.* Grant, 98 U. S., 398; Gurnee *v.* Patrick Co., 137 U. S., 141; 11 Sup. Ct., 34. The same effect must be given to a statute which intends to put

an end to further contest over a disputed title. Thus *In re* Hall, 167 U. S., 38; 17 Sup. Ct., 723, it appeared that, acting under authority previously conferred on it by Congress, the Court of Claims had rendered judgment in favor of one Hall against the District of Columbia for the sum of $8,644.19, with interest thereon from January 1, 1877. Upon appeal to the Supreme Court it was held that there was error in the matter of allowing interest from that date, and the judgment was reversed and the case was remanded to the Court of Claims for correction of this error. The mandate was filed in that court, but, before a new judgment had been entered in conformity with the opinion of the Supreme Court, Congress passed an act depriving the Court of Claims of jurisdiction, and the Supreme Court held that 'the effect of the passage of the repealing act was to take away the jurisdiction of the Court of Claims to proceed further in those cases which were founded upon the act thus repealed. This the Congress had the power to do.' The general rule applicable to cases of this character is laid down by the Supreme Court in Frisbie *v.* Whitney, 9 Wall., 187, in which it is held that, except in cases of vested rights, the power of Congress to control the disposition of the public lands is absolute, and the con-
54 tention of complainant that the control of Congress over the disposition of the land in dispute had ceased to exist, because there was pending before the officers of the Land Department a contest over the validity of the Weed entry, cannot be sustained. Do the facts averred in the bill show that complainant had obtained such a vested right in or to the land in dispute that thereby the same had ceased to be within the control of Congress, a vested right of such a character that the court can enforce it by a decree conveying the title of the land to complainant? The history of the case, as recited in the bill, shows that the decision of the register and receiver at Akron, dismissing complainant's contest and affirming the validity of the Weed entry, had, upon appeal, been confirmed by the Commissioner at Washington, and, on appeal, had been finally confirmed by the Secretary of the Interior, John W. Noble, under date of January 9, 1893.

"The averments of the bill further show that, after John W. Noble had been succeeded in office by Secretary Smith, a petition for a review of the order made by Secretary Noble was filed in the office of the Secretary of the Interior, and was by him entertained and granted and the case was sent back to the local land office for a further hearing on the facts. What effect on the rights of the parties had this order granted by Secretary Smith, whereby it was sought to nullify and set aside the final judgment of the Land Department upon the question of the validity of the Weed entry evidenced by the order of Secretary Noble confirming, on appeal, the action of the Commissioner of the General Land Office, which in turn confirmed the decision and findings of the register and receiver? Is it open to each succeeding Secretary of the Interior to rehear cases decided by his predecessor in office? In Noble *v.* Railroad Company, 147 U. S., 165; 13 Sup. Ct., 271, it is said:

"'A revocation of the approval of the Secretary of the Interior,

however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law, and was therefore void. As was said by Mr. Justice Grier, in U. S. *v.* Stone, 2 Wall., 525: One officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of a court.'

"It is clear from the averments of the bill that the complainant has never yet succeeded in obtaining an adjudication holding that the Weed entry is invalid; but, as already stated, it is shown that up to this time the adjudications of the Land Department have sustained the validity of the Weed entry. If it be held that it was open to Secretary Smith to annul the finding and decision of his predecessor in office and to send the case back to the local land office for a rehearing upon the facts, yet, as the local officers have not taken further action, there is no decision holding the Weed entry to be invalid, and until that is done no right exists in complainant to make entry of the land and thereby acquire an interest in the same. Under the provisions of the act of Congress of May 14, 1880, upon which complainant relies, before a contestant becomes entitled to enter land he must procure a cancellation of the pre-emption or other entry which he contests, and, until this is done, no right to make entry thereof exists in his behalf. The complainant herein does not aver that he has
55 ever succeeded in obtaining a cancellation of the Weed entry, but, on the contrary, the facts averred in the bill show that this entry yet remains uncancelled. The real contention of the complainant is that, if he had been permitted to continue the contest in the Land Department, he would have succeeded in obtaining a cancellation of the entry, and that Congress had no right to terminate the jurisdiction of the Land Department, and thus deprive him of the privilege of continuing the litigation over the validity of the Weed entry. By filing the present bill the complainant practically admits that the jurisdiction of the Land Department over the matter is at an end, and therefore complainant now appeals to the court upon the theory that he has such a vested interest in the land that he is entitled to a decree conveying to him the legal title of the premises, and cites the cases of U. S. *v.* Fitzgerald, 15 Pet., 407; Smith *v.* U. S., 10 Pet., 330; Delassus *v.* U. S., 9 Pet., 133, and Magann *v.* Segal, 34 C. C. A., 323; 92 Fed., 252, in support of his contention; but an examination of these cases shows that none of them give support to the rule contended for by complainant. As is pointed out in Frisbie *v.* Whitney, 9 Wall., 187–196:

"'The courts may very properly correct the injustice done by the land officers in refusing to accord rights, however inchoate, which are protected by laws still in existence, while they can only consider vested rights when those rights are sought to be enforced in opposition to the repeal or modification of the laws on which they are founded. The argument is urged with much zeal, that because complainant did all that was in the power of any one to do towards perfecting his claims, he should not be held responsible for what could not be done. To this we reply, as we did in the case of Rector

v. Ashley, 6 Wall., 142, that the rights of a claimant are to be measured by the acts of Congress, and not by what he may or may not be able to do, and, if a sound construction of these acts shows that he acquired no vested interest in the land then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient.'

"The act of Congress upon which complainant relies in this case conferred upon him the privilege of entering the land in dispute when, and only when, he should succeed in cancelling the prior entry in favor of Weed. This he has not yet succeeded in doing. He entered the contest against Weed in October, 1886, but never obtained a cancellation of the entry; the decisions of the Land Department being adverse to him until in December, 1894, Congress passed an act confirming the Weed entry, and thus made it impossible for the Land Department to further entertain the contest over the validity of the Weed entry. That entry therefore remains uncancelled, and therefore a right to enter the land has never become vested in the complainant. He has never made an entry upon the land, nor has he perfected a right to make an entry thereof by securing a cancellation of theWeed entry, and therefore he has no vested right or interest in the land of which he can avail himself to defeat the operation of the act of Congress confirming the Weed entry. Some reliance is placed, in argument, upon the fact that complainant has paid the costs of the contest and certain fees to Land Department officials. These payments
56 were made with full knowledge of the fact that they would not affect the right to the land, unless the Weed entry was canceled. The payments were not made with the expectation that, by reason thereof, the Land Department would convey the title to the complainant, but they were made in aid of the contest which complainant initiated against the Weed entry, and complainant well knew that these payments would not give him any right to enter the land, unless he succeeded in procuring a cancellation of the previous entry made by Weed; and, as he has failed in his effort to procure a cancellation of this entry, he has not established a right to enter the land by the mere payment of the costs and fees. Under the act of May 14, 1880, it is the procurement of a cancellation of a previous entry and the payment of the Land Office fees that creates the right to a preference in the entry of the land upon the part of the contestant. A performance of one only of the conditions is not sufficient. Both conditions are essential in the creation of the right. The complainant admits that he has not secured the cancellation of the Weed entry, and therefore has failed to show that he has become entitled to enter the land. He never has entered the same, and therefore has no right in the land. He has not perfected a right to enter the land, having failed to secure a cancellation of the Weed entry, and therefore there is no ground shown upon which the court could base a decree that the defendants hold the legal title for his benefit. The utmost he can claim, in view of the facts recited in the bill, is that, if he had been permitted to prolong the contest over the Weed entry before the Land Department, he might have suc-

ceeded in ultimately procuring a cancellation of the entry; but this court cannot accept, as ground for its action, a possibility of this kind, in view of the requirements of the act of Congress that the contestant must succeed in procuring a cancellation of the existing entry before he becomes entitled to create a right in the land by making entry thereof. The demurrer is therefore sustained, and the amended bill is dismissed on the merits at the cost of complainant."

The decree of the circuit court is affirmed.

Filed April 16, 1900.

57 And on the sixteenth day of April, A. D. 1900, in the record of the proceedings of said circuit court of appeals is a decree in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

MONDAY, *April* 16, 1900.

GEORGE F. EMBLEN, Appellant, *vs.* THE LINCOLN LAND COMPANY, GEORGE F. WEED, IDA B. Weed, R. von Horrum Schramm, Viola Abbott, C. Armstrong, Mrs. S. A. Churchill, J. F. Heiserman, Mrs. A. M. Herr, P. F. Huber, Christ Klein, August Muntzing, J. W. Sheedy, M. E. Spaulding, M. L. Thomas, T. J. Tuttle, Mrs. S. J. Wilms, F. M. Adams, E. A. Birdsall, Amos Binford, Josephine Brown, T. B. Babcock, G. W. Dobler, B. F. Durham, A. W. Fields, Alex. Haldan, James Kerr, A. A. McKean, A. F. Meyer, E. J. Pickard, M. W. Peck, Reed Brothers, W. A. Sheedy, P. H. Shea, Dennis Shea, A. N. Turney, F. J. Tuttle, H. H. Walrod, and The Town of Yuma.	No. 1315.

Appeal from the circuit court of the United States for the district of Nebraska.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Nebraska and was argued by counsel; on consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, with costs, and that the Lincoln Land Company, George F. Weed, Ida B. Weed, R. von Horrum Schramm, Viola Abbott, C. Armstrong, Mrs. S. A. Churchill, J. F. Heiserman, Mrs. A. M. Herr, P. F. Huber, Christ Klein, August Muntzing, J. W. Sheedy, M. E. Spaulding, M. L. Thomas, T. J. Tuttle, Mrs. S. J. Wilms, F. M. Adams, E. A. Birdsall, Amos Binford, Josephine Brown, T. B. Babcock, G. W. Dobler, B. F. Durham, A. W. Fields, Alex. Haldan, James Kerr, A. A. McKean, A. F. Meyer, E. J. Pickard, M. W. Peck, Reed Brothers, W. A. Sheedy, P. H. Shea, Dennis Shea, A. N. Tur-
58 ney, F. J. Tuttle, H. H. Walrod, and the Town of Yuma have

and recover against George F. Emblen the sum of twenty dollars for their costs herein and have execution therefor.

April 16, 1900.

And on the fifth day of July, A. D. 1900, a petition for and order allowing appeal was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

In the Circuit Court of Appeals, Eighth Circuit.

GEORGE F. EMBLEN, Complainant and Appellant,
vs.
THE LINCOLN LAND COMPANY, GEORGE F. WEED, IDA B. WEED, R. von Horrum Schramm, Viola Abbott, C. Armstrong, Mrs. S. A. Churchill, J. F. Heiserman, Mrs. A. M. Herr, P. F. Huber, Christ Klein, August Muntzing, J. W. Sheedy, M. E. Spaulding, M. L. Thomas, T. J. Tuttle, Mrs. S. J. Wilms, F. M. Adams, E. A. Berdsall, Amos Binford, Josephine Brown, T. B. Babcock, G. W. Dobler, B. F. Durham, A. W. Fields, Alex. Haldan, James Kerr, A. A. McKean, A. F. Meyer, E. J. Picard, M. W. Peck, Reed Brothers, W. A. Sheedy, P. H. Shea, Dennis Shea, A. N. Turney, F. J. Tuttle, H. H. Walrod, and The Town of Yuma, Defendants and Appellees.

Petition for Appeal.

The above named complainant and appellant, George F. Emblen, conceiving himself aggrieved by the order and decree entered in said cause at the December, 1899, term of said court, whereby the court affirmed the judgment and decree of the United States circuit court in and for the district of Nebraska, dismissing the complainant's amended bill of complaint for want of equity on its merits and at the costs of the complainant, doth hereby appeal
59 from said order and decree of this court to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record and proceedings and papers and evidence upon which said order and decree of this court affirming the said decree of the circuit court in and for the district of Nebraska was made may be duly authenticated and sent to the United States Supreme Court on appeal to said court for final determination.

T. J. MAHONEY,
Solicitor for Complainant and Appellant.

E. R. DUFFIE, *Of Counsel.*

And now, to wit, this 5th day of July, 1900, it is ordered that the appeal be allowed as prayed for, and that the bond on appeal is fixed at one thousand dollars.

AMOS M. THAYER,
Judge of the United States Circuit Court of Appeals.

Endorsed: No. 1315. In the circuit court of appeals, eighth circuit. George F. Emblen, complainant & appellant, *vs.* The Lincoln Land Co. *et al.*, defendants & appellees. Petition for and order allowing appeal. Filed Jul- 5, 1900. John D. Jordan, clerk.

And on the fifth day of July, A. D. 1900, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

In the Circuit Court of Appeals, Eighth Circuit.

60 GEORGE F. EMBLEN, Complainant and Appellant,
vs.
THE LINCOLN LAND COMPANY, GEORGE F. WEED, IDA B. WEED, R. von Horrum Schramm, Viola Abbott, C. Armstrong, Mrs. S. A. Churchill, J. F. Heiserman, Mrs. A. M. Herr, P. F. Huber, Christ Klein, August Muntzing, J. W. Sheedy, M. E. Spaulding, M. L. Thomas, T. J. Tuttle, Mrs. S. J. Wilms, F. M. Adams, E. A. Berdsall, Amos Binford, Josephine Brown, T. B. Babcock, G. W. Dobler, B. F. Durham, A. W. Fields, Alex. Haldan, James Kerr, A. A. McKean, A. F. Meyer, E. J. Picard, M. W. Peck, Reed Brothers, W. A. Sheedy, P. H. Shea, Dennis Shea, A. N. Turney, F. J. Tuttle, H. H. Walrod, and The Town of Yuma, Defendants and Appellees.

Assignment of Errors.

Comes now the above-named complainant and appellant, George F. Emblen, and shows that there is manifest error prejudicial to said complainant and appellant in the judgment, order, and decree of the United States circuit court of appeals in and for the eighth circuit entered in the above-entitled cause in this court, in this, to wit:

1. That the court erred in affirming the decree of the circuit court of the United States in and for the district of Nebraska.

2. That the court erred in approving and adopting the opinion of the circuit court as the law of the case.

3. That the court erred in refusing to reverse the judgment and decree of the circuit court of the United States in and for the district of Nebraska in said cause.

4. That the court erred in not reversing the decree of the circuit court of the United States and ordering the entry of a decree in said cause granting to the complainant the relief prayed for in his amended bill in said cause.

T. J. MAHONEY,
Solicitor for Complainant and Appellant.

E. R. DUFFIE, *Of Counsel.*

61 Endorsed: 1315. In the circuit court of appeals, eighth circuit. George F. Emblen, complainant & appellant, *vs.* The Lincoln Land Company *et al.*, defendants & appellees. Assignment of errors. Filed Jul- 5, 1900. John D. Jordan, clerk.

And on the third day of August, A. D. 1900, a bond on appeal was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

Know all men by these presents that we, George F. Emblen, appellant, as principal, and The American Bonding and Trust Company of Baltimore City, as surety, are held and firmly bound unto The Lincoln Land Company, George F. Weed, Ida B. Weed, R. von Horrum Schramm, Viola Abbott, C. Armstrong, Mrs. S. A. Churchill, J. F. Heiserman, Mrs. A. M. Herr, P. F. Huber, Christ Klein, August Muntzing, J. W. Sheedy, M. E. Spaulding, M. L. Thomas, T. J. Tuttle, Mrs. S. J. Wilms, F. M. Adams, E. A. Birdsall, Amos Binford, Josephine Brown, T. B. Babcock, G. W. Dobler, B. F. Durham, A. W. Fields, Alex. Haldan, James Kerr, A. A. McKean, A. F. Meyer, E. J. Pickard, M. W. Peck, Reed Brothers, W. A. Sheedy, P. H. Shea, Dennis Shea, A. N. Turney, F. J. Tuttle, H. H. Walfrod, and The Town of Yuma, appellees, in the full and just sum of one thousand dollars ($1,000), to be paid to the said The Lincoln Land Company and above-named appellees, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-seventh day of July, in the year of our Lord one thousand nine hundred.

Whereas lately, at the December term, A. D. 1899, of the United States circuit court of appeals for the eighth circuit of the United States, in a suit depending in said court between George F. Emblen, plaintiff, and The Lincoln Land Company *et al.*, defendants, a decree was rendered against the said plaintiff, and the said George F. Emblen has obtained an appeal of the said court to reverse the decree in the aforesaid suit, and a citation, directed to the
62 said The Lincoln Land Company *et al.*, defendants, citing and admonishing them to be and appear in the Supreme Court of the United States, at the city of Washington, thirty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said George F. Emblen shall prosecute said appeal to effect and answer all damages and costs if he fails to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

GEO. F. EMBLEN, *Principal.* [SEAL.]
THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY, [SEAL.]
By THOMAS BRENNAN, *Vice-Pres't.*
Attest: ALLAN PARMER, *Ass't Sec'y, Surety.*

Sealed and delivered in presence of—
Witness:
F. L. CANDEE,
As to principal.
A. M. LARSON,
W. R. DUNN,
As to surety.

Approved by—
AMOS M. THAYER,
U. S. Circuit Judge for the Eighth Circuit.

[One-half-cent int. rev. doc. stamp, cancelled.]
[Two-cents int. rev. doc. stamp, cancelled.]

Endorsed: No. 1315. United States circuit court of appeals, eighth circuit. George F. Emblen *vs.* The Lincoln Land Company *et al.* Bond. Filed Aug. 3, 1900. John D. Jordan, clerk.

63 And on the sixteenth day of July, A. D. 1900, a citation on appeal was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with the acknowledgment of service endorsed thereon, is hereto attached and herewith returned.

64 The United States of America to the Lincoln Land Company, George F. Weed, Ida B. Weed, R. von Horrum Schramm, Viola Abbott, C. Armstrong, Mrs. S. A. Churchill, J. F. Heiserman, Mrs. A. M. Herr, P. F. Huber, Christ Klein, August Muntzing, J. W. Sheedy, M. E. Spaulding, M. L. Thomas, T. J. Tuttle, Mrs. S. J. Wilms, F. M. Adams, E. A. Birdsall, Amos Binford, Josephine Brown, T. B. Babcock, G. W. Dobler, B. F. Durham, A. W. Fields, Alex. Haldan, James Kerr, A. A. McKean, A. F. Meyer, E. J. Pickard, M. W. Peck, Reed Brothers, W. A. Sheedy, P. H. Shea, Dennis Shea, A. N. Turney, F. J. Tuttle, H. H. Walrod, and the Town of Yuma, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein George F. Emblen is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Amos M. Thayer, judge of the United States circuit court of appeals for the eighth circuit, this fifth day of July, in the year of our Lord one thousand nine hundred.

AMOS M. THAYER,
Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

Service of this citation acknowledged this July 9th, 1900.
J. W. DEWEESE,
Solicitor for Respondents Above Named.

[Endorsed:] No. —. Supreme Court of the United States. George F. Emblen, appellant, *vs.* The Lincoln Land Co. *et al.* Citation on appeal. Filed Jul- 16, 1900. John D. Jordan, clerk.

65 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing 64 pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit

court of appeals, in the case of George F. Emblen, appellant, *vs.* The Lincoln Land Company *et al.*, No. 1315, December term, 1899, as fully as the same remain on file and of record in my office.

I do further certify that the original citation, with acknowledgment of service endorsed thereon, is hereto attached and herewith returned.

I do further certify that on the twenty-third day of June, A. D. 1900, a mandate was issued in said cause to the United States circuit court for the district of Nebraska.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this third day of August, A. D. 1900.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No., 17,888. U. S. circuit court of appeals, 8th circuit. Term No., 403. George F. Emblen, appellant, *vs.* The Lincoln Land Company, George F. Weed, Ida B. Weed, *et al.* Filed August 25th, 1900.

No. 403, 147

By. of Duffie for Appt

Office Supreme Court U.S.
FILED
APR 27 1901
JAMES H. MCKENNEY,
Clerk.

APPELLANT'S BRIEF.

Filed April 27, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

NO. 403.

GEORGE F. EMBLEN, APPELLANT,

vs.

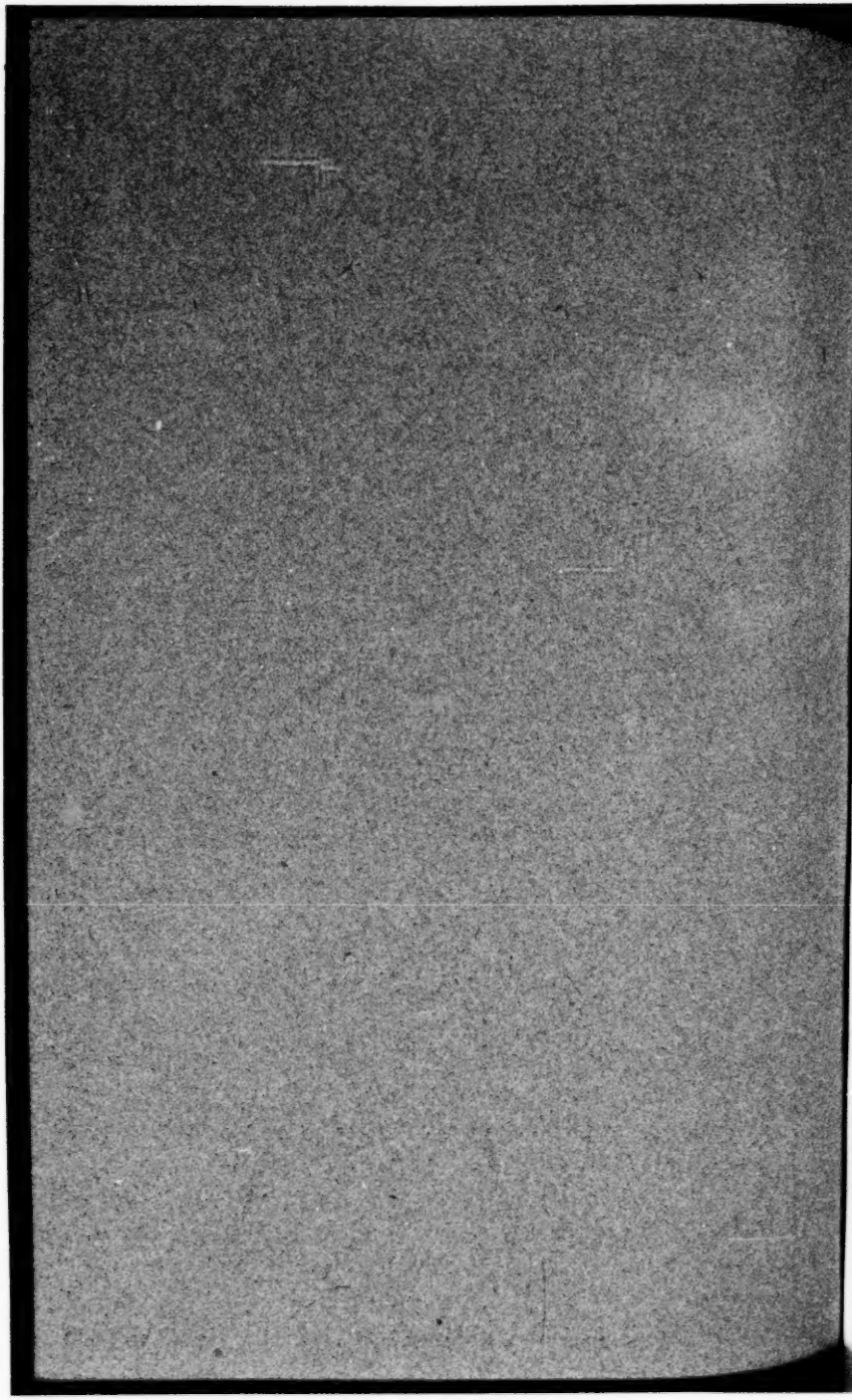
THE LINCOLN LAND COMPANY ET AL., APPELLEES.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

T. J. MAHONEY AND E. R. DUFFIE,

FOR APPELLANT.

(17,888.)



APPELLANT'S BRIEF.

Supreme Court of the United States.

OCTOBER TERM, 1900.

NO. 403.

GEORGE F. EMBLEN, *Appellant*,

vs.

THE LINCOLN LAND COMPANY ET AL., *Appellees*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

T. J. MAHONEY AND E. R. DUFFIE, *For Appellant*.

STATEMENT OF CASE.

As this is an appeal from the decision of the Circuit Court of Appeals, affirming a judgment of the Circuit Court sustaining a demurrer to the amended bill, a complete statement of the facts would be simply a repetition of the averments contained in the amended bill of complaint which is set out in full, commencing at page six, in the printed record. A condensed statement of the averments, may, however, be of some service. They are:

1st. That George F. Weed made pre-emption cash entry for the land in question at the Denver land office, September 19, 1885.

2. That appellant made contest against said entry October 4, 1888.

3. That the grounds of the contest were that the entry was fraudulent, that the entry was made for speculative purposes; that Weed had not complied with the law as to residence.

4. That the purpose of the contest was to defeat

Weed's entry and to enable appellant to enter the lands under the second section of the Act of May 14, 1880.

5. At the hearing on the contest at the Denver office, the contest was dismissed on its merits, appellant appealed to the Commissioner of the General Land Office, where a hearing resulted in a decision reversing the decision of the Denver office and holding Weed's entry for cancellation as fraudulently made.

6. Weed moved for a new trial and a petition of intervention was filed on behalf of the town of Yuma, which had been established on the land, praying that petitioners be permitted to intervene and support the entry.

7. The Commissioner of the General Land Office then made a ruling that Weed was not entitled to a new trial, but that a further and additional hearing would be had at the Denver office to allow Weed and intervenors to offer additional testimony to rebut the evidence previously given in support of the contest. Before the further hearing was had a new district was created, with local office at Akron, and this contest was transferred to that office. Appellant refused to proceed to Akron and refused to recognize the jurisdiction of the local officers at that office, because the receiver at that office was an interested party and in effect one of the intervenors.

8. The local land office at Akron then made an order dismissing the contest, from which Emblen appealed to the Commissioner of the General Land Office, who affirmed the decision of the Akron office, and denied Emblen an appeal to the Secretary of the Interior.

9. Emblen then proceeded by *certiorari* before the Secretary of the Interior, who ordered the record certified to his office and who, on receipt of the record, affirmed the decision of the Commissioner of the General Land Office.

10. Thereafter, Emblen moved, before the Secretary of the Interior, for a new trial, largely on the ground of newly discovered evidence. The new trial was granted in an order by the Secretary of the Interior holding that appellant was entitled to it on the ground of newly discovered evidence, and also holding that the interest of the

receiver, at the Akron office, was such as to deprive him of jurisdiction to try the contest (printed record, p. 28). This order left the matter just where it was left by the first ruling of the Commissioner of the General Land Office, with Weed's entry held for cancellation on the ground that he had not made a *bona fide* settlement, and allowing Weed and the intervenors to offer proof to rebut the evidence on which the entry was held for cancellation.

11. The further hearing was continued from time to time and Weed and the intervenors, instead of availing themselves of the opportunity to offer their evidence and show why the entry should not be cancelled, procured the passage of an Act of Congress, approved December 29th, 1894, in these words:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that the pre-emption cash entry numbered 4990, of George F. Weed, made at the District Land Office at Denver, Colorado, on the 19th of September, 1885, for the southeast quarter of section twenty-two (22), township two (2), north of range forty-eight (48) west, which tract embraces the town of Yuma, Colorado, the county seat of Yuma County, Colorado, be and the same is hereby confirmed and that patents of the United States issue therefor to the said Weed."

12. In pursuance of this Act a patent was issued to Weed.

13. The other defendants in this suit acquired whatever interests they have from Weed and pending the contest before the patent was issued and with notice of Emblen's rights.

14. The amended bill alleges, and for the purpose of the demurrer, it was admitted that Weed's entry was fraudulent and for speculative and townsite purposes and made under an agreement with defendant, the Lincoln Land Company, by which he was to convey an undivided one-half to said company for the purpose of a townsite, and on a further hearing before the local land office, it would have been impossible for Weed and the intervenors to overcome

the proof already in as to the fraudulent character of the entry.

15. The bill also discloses that at the hearing at the Denver office Emblen made an offer to relinquish his rights under the Act of 1880 if he would be permitted to prosecute his contest under Rule 55 of the Land Department, whereby he would be required to pay only his own costs, but this offer was refused by the local officers and he was required to retain his status as a contestant claiming the benefit of the Act of 1880 and prosecute under Rule 54 and bear all the costs. He acquiesced in that ruling and bore all the costs in accordance with Rule 54 and the Act of 1880. The relief prayed for was an accounting for portions of the land sold by the defendants, that the defendants be decreed to hold the land in trust for the complainant, and that they be decreed to execute the trust by conveyance to complainant.

Points Raised.

The points raised can best be stated by giving a synopsis of the decision handed down by the District Judge, and adopted by the Circuit Court of Appeals, as follows:

1. That Congress has the power to withdraw the jurisdiction of the land department over contested entries and adjudicate upon them itself.

2. That it is questionable whether one secretary of the interior has the power to grant a new trial or rehearing in a matter passed on by his predecessor.

3. That a contestant under the Act of 1880 acquires no rights by instituting a contest, paying the costs and prosecuting his contest to a decision holding the entry for cancellation by proving the fraudulent character of the entry.

4. That nothing short of an absolute cancellation of the entry will give a contestant under the Act of 1880 any right, which will be protected by a court of equity as against the entry-man who wrongfully obtains the patent.

5. To the foregoing might be added the contention of the defendants, not referred to in the decision by the district judge, that Emblen lost his rights under the Act of

1880 by his offer to relinquish those rights on condition of being permitted to prosecute the contest, under Rule 55 of the Land Department.

Assignments of Error.

For purposes of review the assignments of error (printed record, p. 37) may be reduced to one: The Court erred in sustaining the demurrer.

The Argument.

1. The trial Court held that the Act of Congress in confirming the Weed entry was equivalent to a withdrawal of the jurisdiction of the Land Department, and cited the case *In re Hall*, 167 U. S., 38, and other cases of the repeal of acts giving certain courts certain jurisdiction, as authority. These were all cases in which jurisdiction was lost, by reason of a repealing Act, and the case, *In re Hall*, was one where the Act repealed granted a mere gratuity, without any consideration. Authorities of this class can have no legitimate bearing on the case at bar. The Act here complained of was not a repeal of previous Acts, granting jurisdiction to the Land Department. It did not assume to deal with the question of jurisdiction at all. Its language is not the language of legislation. It is the language of a decree. True, the Constitution vests Congress with "the paramount control over the disposition of the public lands of the United States." But how? Does it give Congress authority to adjudicate conflicting claims between private parties as to rights acquired in land that was once public land? The language of the Constitution is: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States." Now, Congress has made certain rules and regulations concerning the public lands, one of which is the Act of 1880. Grant that Congress may repeal or modify this rule; grant that it may repeal all other rules, or acts, vesting certain authority in the Land Department. But it has not attempted to do so. The Act complained of does not go upon the theory that the land in question belongs to the United States, so that Congress might even

donate it to Weed. It recognized that the validity of Weed's entry was contested, that the government had no longer any beneficial interest in the land, and it simply assumed to pass, judicially, upon the merits of the controversy between Weed and Emblen. Had Congress any power to enter such a decree? The government had parted with everything but the naked legal title. The Constitution only gives Congress the right to dispose of what belongs to the United States. It cannot dispose of more. The United States owned the naked legal title which it held in trust for the person who, under previous legislation and compliance therewith, was entitled to the beneficial interest. It could dispose of only the naked legal title and thereby make its grantee its successor as trustee. But could it adjudicate as to the equitable rights of contesting claimants? Section 1 of Article 3 of the Constitution vests the judicial power of the United States in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

In the Dartmouth College case, Webster, speaking of the legislative power, and distinguishing it from the judicial power, said: "It shall not judge, by *act*; it shall not *decide* by *act*; it shall not deprive by act; but it shall leave all these things to be tried and adjudged by the law of the land." In the Act in question, if it is to be construed in terminating Emblen's rights, Congress has attempted to *judge* by *act*, to *decide* by *act* and to *deprive* by *act*. This thought must have been in the minds of the judges of this Court when they said, respecting this same controversy, in the case, *In re Emblen*, 161 U. S., 52: "The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor."

2. While the decision of the District Judge is not based upon the point, a question is suggested as to the authority of Secretary Smith to grant a rehearing on a matter passed upon by Secretary Noble. The application for a rehearing was filed just two days before Secretary Noble went out of office. (See Exhibit A, printed record, p. 21.) It was ruled on some time later by Secretary Smith. The only objection then raised to the authority of the secretary was based on the question of time allowed under the rules of the department for presenting a motion to review. (Printed record, p. 26.) This question was disposed of on the ground that the rules of the department do not limit the time for such a

motion based on newly discovered evidence. But the District Judge and the court of appeals in adopting his opinion in this case seem to think that the termination of the term of office of one secretary of the interior leaves his successor without jurisdiction, to determine pending controversies. It might as well be said that when the judge of a trial court goes out of office his successor cannot grant a new trial on the ground of newly discovered evidence. This would be making the person, and not the office, the tribunal. It would be saying that judicial power, and executive function are vested in certain persons and not certain courts or officers. The authority to pass on contests in respect to pre-emption entries, was vested not in Secretary Noble, but in the Secretary of the Interior.

3. Did Emblen acquire no rights by his contest at his own expense which a court of equity ought to protect?

The fallacy, it appears to us, in the position taken by the Circuit Court and the Court of Appeals is in dealing with this land as though it were public land, the property of the United States and subject to the control of Congress and in wholly ignoring the distinction between legal and equitable rights. The bill alleges that the defendant, George F. Weed, made a pre-emption cash entry for the southeast quarter of section twenty-two (22), township two (2), north of range forty-eight (48) west, on September 19th, 1885, at the local land office at the City of Denver and received a final receipt from the register of said office under the laws, rules and regulations of the Land Department of the United States then having such lands within its jurisdiction, etc.

It has been held in numerous cases that where the entryman has paid for the land and received a final receipt that he is then the equitable owner and the government holds the naked legal title in trust and has no other interest in the premises, and this is the case whether the entry be a cash entry or a donation.

Witherspoon vs. Duncan, 4. Wall., 210. In that case it was said: "But it is insisted that there is a difference between a cash and donation entry. That the one may be complete when the money is paid but the other is not perfected until it is confirmed by the General Land Office and the patent issued. * * * If the law on the subject is complied with and the entry conforms to it, it is

difficult to see why the right to tax does not attach to the donation as well as to the cash entry. In either case when the entry is made and certificate given the particular land is segregated from the mass of public land and becomes private property."

Weed was the owner of the land and his title was subject to be defeated only by showing that such title was acquired fraudulently. Prior to the act of May 14th, 1880, no one but the government had any right to question Weed's title or to assail it as fraudulent.

Sioux City & Iowa Falls Town Lot & Land Co. vs. Griffey, 143 U. S., 32. In that case it is said:

"It was no matter of interest to the Company what became of the title. The Government, the owner of the land, was satisfied with what Griffey had done, took from him its land warrant as payment and patented the land. Into the bona fides of this transaction no one but the government can inquire."

The government, however, had and has a right to inquire into the bona fides of all pre-emption and homestead entries even after the issue of a patent, and having that right it can transfer it to any third party who becomes thereby invested with an interest which after acceptance cannot be divested by Congress or by anyone except in a lawful manner. If Weed became the owner of this land by fraud perpetrated upon the United States and the United States had a right to question his title and to cancel it if the fraud was found, then it had the right to transfer this cause of action to a third party and after acceptance by the third party, and especially after the assignee of the right had expended his time and money in an effort to show the fraudulent character of the title held by Weed, Congress could no more take from him this right than it could divest him of any other property which he held and which came to him fairly and honestly.

In *U. S. vs. Fitzgerald*, 15 Pet., 408, the facts were as follows: Fitzgerald had been appointed in 1833 inspector of customs for the district of Mississippi, and by the collector of New Orleans he had been employed as boarding officer at the Southwest Pass on the Mississippi river and

went into possession of a tract of land which had been occupied by a prior boarding officer in the service of the United States. The collector was not instructed by the Treasury Department to place the boarding officer on that or any other tract of land, nor was he bound to reside there. The United States had provided no accommodations for the boarding officer. The collector had not, before position was so taken, requested that the land should be reserved for the use of the boarding officer of the custom house at New Olreans. Fitzgerald on the 18th of June, 1836, entered the tract of land with the register of the land office in New Orleans and he and his wife expended their own money on the improvements of the tract and complied with all the requisitions of the law of the United States granting pre-emption rights. Proof was made before the register at the land office of the possession and cultivation of the tract and the purchase money was paid to the United States. The acting commissioner of the land office on the 3rd of November, 1836, wrote to the register of the land office at New Orleans stating that the Secretary of the Treasury had directed that the land should be reserved from sale for the use of the custom house at New Orleans and requesting that it should be marked as reserved from sale on the plats of land in his office. This attempted reservation was made after the cash entry by Fitzgerald. The government, desiring to use this land for light house purposes, brought an action of ejectment against him to eject him from the land. The circuit court dismissed the petition and decreed that Fitzgerald should be quieted in the possession of the premises. On appeal the decision was affirmed.

In *Carroll vs. Stafford*, 3 How., 441, it is said:

"When the land was purchased and paid for it was no longer the property of the United States, but of the purchaser. He held for it a final certificate which could no more be cancelled by the United States than a patent. It is true if the land had been previously sold by the United States or reserved from sale, the certificate or patent might be recalled by the United States as having been issued through mistake. In this respect there is no difference whatever between the certificate holder and the patentee. It might be added that in the case of a homestead preemption entry after final certificate or even after patent has

been issued, it could be recalled if upon investigation it was found that the holder had obtained the same by a fraud practiced upon the government. At least a court of equity upon an allegation of a fraudulent entry would cancel the certificate or the patent issued by the officers of the government in ignorance of the fraud."

In *Wisconsin Central R. R. Co. vs. Price County*, 133 U. S., 496, it is said:

"After public lands have been entered at the land office and the certificate obtained, they are private property, the government agreeing to make a conveyance as soon as it can and in the meantime holding the naked legal fee in trust for the purchaser who has the equitable title."

Mr. Justice Field makes the following quotation from *Witherspoon vs. Duncan*, 71 U. S., 210-218:

"In no just sense can lands be said to be public lands after they have been entered at the land office and their certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale the government has no power to revoke the entry and withhold the patent. A second sale if the first was authorized by law, confers no right on the buyer and is a void act."

And again:

"The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser who has equitable title."

No case can be found holding that after entry and payment for the land Congress has any jurisdiction to legislate in relation thereto. After the government has received its money the equitable title has passed to the purchaser and he holds the land as free from interference by Congress as from any other source. In the present case Weed had entered and paid for the land and Congress had no right or jurisdiction to interfere with the title. It is true that under laws existing at the time Weed made his entry the government had a right to institute an inquiry to ascertain whether the entry was fraudulent and whether Weed had acted in good faith in his dealings with the government. If this investigation was instituted by the land department prior to

the issue of a patent to Weed and resulted in finding that his entry of the land was fraudulent, that he had pre-empted it for speculative purposes, the land department might refuse to issue the patent and might perhaps cancel the entry. If a patent had issued prior to an investigation then Weed's title conveyed to him by the patent could be set aside only by an action in court and this action could be instituted by the government at any time so long as Weed held the legal title. These conditions make it apparent that until Weed's title was set aside he was the owner of the land and that no legislation by Congress could in any manner affect the title. The right of the government to institute proceedings to cancel his title for fraud conferred upon Congress no right to dispose or attempt to dispose of the land until the fraud was established and his title set aside. It is true Congress could, if it had not conveyed away its rights, waive the fraud of Weed, if any there was, in obtaining title to the land, and either allow a patent to issue in the usual course of the business of the land department or direct the issuing of a patent at once, but our contention is that the Act of 1880 was an offer to any resident of the United States qualified to take the benefit of the pre-emption or homestead laws to become the assignee of the government, in any right of action which it might possess against a fraudulent pre-emptor, or a fraudulent homesteader, and to prosecute that right to judgment, and as a compensation therefor to acquire a preference right of entry to the land which his proceedings thus instituted and prosecuted might show to have been fraudulently acquired from the government by the contestee.

The learned Circuit Court proceeds upon the theory that the complainant in this case obtained no privilege under the Act of 1880 until he had succeeded in cancelling the prior entry in favor of Weed. That there was no vested right in the land and no vested right in the cause of action or the right to contest for the land which would prohibit Congress from dealing with it as though no steps had been taken by the complainant under the Act of 1880. This we conceive to be error.

It is true that under the Act of 1880 the absolute legal right of a contestant to avail himself of the preference given

by the Act is not complete until the entry attacked is cancelled. But it by no means follows that a contestant acquires no rights prior to the formal entry of the cancellation. There are many rights which a Court of Law can neither recognize nor enforce. They are not complete in the legal sense, and yet their protection is so much a matter of good conscience that the Courts of Equity unhesitatingly interfere for their enforcement. The Act in question provides, in express terms, when a complete legal right or legal title to a given remedy shall vest: and that is upon the completion of the contest resulting in a cancellation of the entry. But when such a result is brought about the contestant has no occasion to apply to a Court of Equity for his protection. The cancellation of the entry has terminated all rights of the entryman, and if the officials of the land department should then refuse the contestant an opportunity to avail himself of the preference right given by the Act, his remedy would be in a Court of Law, which would unquestionably grant him a writ of mandamus, compelling the officials of the land department to respect his preference right, and give him an opportunity to avail himself of it. We concede that in the sense of having acquired a complete legal right, enforceable by the Courts of Law, such complete right would not vest until the entry is actually cancelled, and we concede that in this case the entry never was cancelled. Had the contest been terminated by a decision of the land department cancelling Weed's entry, there would have been no occasion for Emblen to seek the protection of a Court of Equity. His remedy would have been complete at law. But the contest never was conducted to a final decision in the land department. Its prosecution was interfered with by the special Act of Congress, which assumed to adjudge Weed's entry valid. Emblen then sought a remedy at law in the form of a writ of mandamus, to be issued by this Court, but your honors decided (*in re Emblen*, 161 U. S., 52) that he was seeking the wrong remedy. In that case your honors said:

"Such being the state of the case, it is quite clear that (even if the Act of Congress was unconstitutional, which we do not intimate) the writ of mandamus prayed for should not be granted. The determination of the contest between

the claimants of conflicting rights of pre-emption, as well as the issue of a patent to either, was within the general jurisdiction and authority of the land department, and cannot be controlled or restrained by mandamus or injunction. After the patent has once been issued, the original contest is no longer within the jurisdiction of the land department. The patent conveys the legal title to the patentee, and cannot be revoked or set aside, except upon judicial proceedings instituted in behalf of the United States. The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor. This is clearly settled by previous decisions of this Court, including some of those on which the petitioner most relies."

We cannot help feeling that both the Circuit Court and the Circuit Court of Appeals entirely failed to appreciate the force of the above language, stating the doctrine of this Court. Your honors declined in that case to say, or even to intimate whether the act assuming to quiet Weed's title was valid or not; but it seems to us that your honors do hold that if that act were invalid Emblen was vested, by virtue of his contest, with such equitable rights as would entitle him to relief at the hands of a Court of Equity, charging a trust upon the title acquired by Weed, and compelling Weed to execute the trust. In other words, this Court in holding that Emblen had not acquired a right enforceable at law, but that his remedy was in equity, if the Act in question was invalid, has decided that before the final termination of a contest a contestant has acquired some rights which as between himself and the contestee a court of equity ought to protect.

But the Circuit Court and the Circuit Court of Appeals looked only to the letter of the law, and refused to recognize any but strictly legal rights, and because the legal right to demand and enforce by an action at law the preference offered by the Act of 1880 was not complete until a final judgment of cancellation had been entered against the entryman, both the Circuit Court and the Circuit Court of Appeals held that no right had vested in the contestant. The distinction between legal and equitable rights and legal and equitable remedies is the key to the problem presented by this case. Our contention is, that when Emblen initiated the contest and paid the costs thereof he acquired the

rights and standing given to a contestant by the Act of 1880. He acquired the right of prosecuting his contest to a final determination, and a cancellation of the entry, if the contest was well founded, as the bill in this case alleges it was. We think it must be conceded that he had acquired the exclusive right to contest Weed's entry, and that while he was prosecuting his contest no other person could oust him from his position as contestant, and get the benefit of the contest, as far as prosecuted by him. We believe that any interference by the officials of the land department, or the contestee, or a third party, to prevent him from continuing to prosecute the contest would be such an invasion of his rights as would be enjoined by a court of equity. Grant that the contest has not proceeded so far as to give him, as a matter of law, the preference right to enter the land, the question which is presented by his bill in equity is, did it not give him the equitable right to charge Weed with a trust in his favor?

The object of the act of 1880 was to induce parties to give their time and expend their money in ferreting out fraudulent homestead and pre-emption entries. By this act Congress said to everyone who desired to take advantage of it: The government has a right to institute an action, has a cause of action against every fraudulent pre-emptor or homesteader. This right we will assign to you provided you will assume the burden of discovering and proving the fraud. When this offer is accepted and when time and labor and money have been expended upon the faith of it the contract becomes a binding contract which the government cannot avoid. It is not necessary in order to make a binding contract that money should be paid for it. If money is expended on property on the faith of a contract it constitutes a valuable consideration.

King's Heirs vs. Thompson, 9 Pet., 204.

Haines vs. Haines, 6 Md., 435.

In the case of *King vs. Thompson*, George King a few days after the marriage of his daughter to Thompson proposed to grant to him a house and lot in Georgetown then much out of repair and untenantable provided he would repair the same so as to make it a comfortable residence and

saying that he intended the property for his daughter. This proposition was accepted by Thompson, who repaired the property, expending upwards of $4,000 on the same. This was held by the Supreme Court to be a valid contract based upon a valuable consideration. It is true that those seeking the benefit of section 2 of the Act of 1880 do not pay the government anything in the way of money for the right of action which they take from the government to establish the fraudulent character of homestead and pre-emption entrymen, but they do devote their time and expend their money in unearthing these frauds and after they have entered upon the performance of a contract the government cannot withhold from them performance upon its part by so disposing of the land as to make their efforts fruitless. They have a vested right in the cause of action which the government has placed in their hands to prosecute, and they have a vested right in whatever fruits may result from the judgment ultimately entered in such an action or such a proceeding.

It is sometimes said that estoppels do not run against the government. This may be true in regard to purely governmental matters, but when the government descends from the plane of sovereignty and contracts with its citizens, such government, in respect to such act, is regarded as a private person itself and bound accordingly. *Davis vs. Gray*, 16 Wall., 203; *Hall vs. Wisconsin*, 103 U. S., 5; *People vs. Stephens*, 71 N. Y., 527.

The case of *Pennoyer vs. McConnaughy*, 140 U. S., 1; 11 Sup. Ct. Rep., 699, strongly supports our contentions both that a contract existed between Emblen and the government and that Emblen is entitled to the protection of the courts to prevent a successful violation of the contract. In that case it appeared that in 1870 the Legislature of the State of Oregon by general law, prescribed terms on which swamp lands allotted to the state could be purchased by citizens. Among the requisite conditions, were the filing of an application and thereafter the payment of 20 per cent of the purchase price. In 1878 another act on the subject modified the time of payment of the 20 per cent. This act took effect January 17, 1879. By a still later act in 1887, it was provided that all certificates on which the 20 per cent

had not been paid prior to January 17, 1879, the date of the taking effect of the second act, should be declared null and void and should be cancelled. The complainant's grantor had made application under the act of 1870, but the 20 per cent was not paid until after the 17th of January, 1879. The relief sought was an injunction against the state board of land commissioners to prevent a disposition of the lands to other parties. The case was disposed of on bill and demurrer. In overruling the demurrer the District Judge said: "The transaction as set forth in the statute has all the elements of a contract of sale. The statute is a formal standing offer by the state of these lands for sale on the terms therein mentioned, and an invitation to all qualified citizens of the United States to become purchasers thereof by filing an application for some specific tract thereof, with the board, and complying with the subsequent condition of payment and reclamation. The application is a written acceptance of the offer of the state, in relation to the land described therein, and on the filing of the same, the minds of the seller and purchaser—the state and the applicant—came together on the proposition and thenceforth, there was an agreement between them for the sale and purchase of that part of the land, binding on each of them until released therefrom by some substantial default of the other, not overlooked or excused."

The correctness of that part of the opinion which declared the existence of a binding contract from the mere filing of the application was questioned by this Court on the strength of *Yosemite Valley* case, 15 Wall., 77, and *Frisbie vs. Whitney*, 9 Wall., 187. But this Court held that whether or not there was a binding contract as soon as the application was filed, there was such binding contract the moment that the 20 per cent was paid. The court say: "In other words, by such payment, this contract with the state became so far executed as to be embraced in the class of contracts protected by section 10 of article 1, of the constitution of the United States, which declares that no state shall pass any laws impairing the obligation of contracts."

The important inquiry here arises whether the case at bar comes within the rules announced in Frisbie vs. Whit-

ney and the Yosemite Valley cases or whether the facts pleaded make a case more nearly akin to Pennoyer vs. McConnaughy. The opinions in Frisbie vs. Whitney and Yosemite Valley cases were based on facts peculair to these cases. The pre-emptor had gone in by force; there was not a single equity in his favor; and he had parted with nothing and the government had received nothing as a consideration for the right claimed. The whole theory of the pre-emption statute is the giving of a gratuity for the benefit of the donee and without any consideration to the government, as the owner of the land, until payment is made. The pre-emptor neither pays a present consideration nor does he undertake such obligation as will form the basis of a contract. But notwithstanding the feeble character of a pre-emptor's claim, the later decisions of this Court have materially limited the application of the doctrine announced in Frisbie vs. Whitney and Yosemite Valley cases, and the rule now is, even in pre-emption cases, that while, no vested right *as against the United States* is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or acquisition of the land, and rights so acquired, even though inchoate have been repeatedly protected by this Court.

Ard vs. Brandon, 156 U. S., 537; *Shipley vs. Cowan*, 91 U. S., 330-338.

Morrison vs. Stalnaker, 104 U. S., 212; *Duluth & I. R. R. Co. vs. Ry.*, 173 U. S., 587; *19 Sup. Ct. Rep.*, 549.

These later decisions clearly show that the doctrine of Frisbie vs. Whitney and the Yosemite Valley cases should not be extended to conflicting rights between private parties, especially when the party invoking the aid of the court has paid to the government a valuable consideration for the right he claims and such consideration has been accepted and retained.

We believe that the doctrine of Pennoyer vs. McConnaughy applies to the case at bar. The government having offered to dispose of its lands on certain conditions has a substantial interest in protecting itself against fraud. Prior

to 1880 it had offered no special inducement to its citizens to aid it in preventing fraud. But by the second section of the act of May 14, 1880, it has made a standing offer of a certain right to any person who will, *at his own expense*, prove an attempted fraud. Emblen accepted this offer, by instituting this contest. He was then in the attitude of the intending purchaser who had merely filed his application under the Oregon statute in the case of Pennoyer vs. McConnaughy, and if the rule announced by the District Judge in that case were to be adopted, a contract was complete between him and the government the moment the contest was filed. But accepting the rule of this Court in that case, even though the filing of the contest did not make a contract, his subsequent prosecution of the contest and paying the costs thereof did. He offered at one time to withdraw all claim of preference if he would be permitted to contest under the law as it was prior to 1880. This offer the government's representatives declined and thereafter Emblen bore all the expense, paid all costs and succeeded in obtaining a ruling that Weed's entry was fraudulent and holding the same for cancellation. This ruling was never afterwards legally disturbed, and when Congress intervened to affirm Weed's entry the case stood upon the docket of the local land office for trial with Emblen's case made out in chief and the burden resting on the entryman to make his defense.

There was here every element of a contract present in the Oregon case after the 20 per cent had been paid. There was the standing offer of the government; there was Emblen's acceptance of the offer, and there was his payment of the consideration asked by the government. He had thereby acquired a right which should be protected against every person who took title to the land with notice of his equities.

That rights may be acquired by instituting and carrying on a contest, even before it is completed, is further shown by the amendment, adopted July 26, 1892, to the second section of the act of May 14, 1880, providing that after the contest is initiated, it shall not abate by the death of the contestant, but his heirs may continue the prosecution and

they shall be entitled to the same rights as the contestant would have had if his death had not occurred. This amendment was in force for more than two years before Congress attempted to confirm Weed's entry. It would be rather anomalous to say that a contestant's heirs inherit a right from him and that he himself had no right.

But the courts below seemed to be of the opinion that two conditions must be complied with before the complainant could acquire any right. The language of the Circuit Judge is: "Under the act of May 14, 1880, it is the procurement of a cancellation of a previous entry and the payment of the land office fees that creates the right to a preference in the entry of the land upon the part of the contestant. A performance of one only of the conditions is not sufficient. Both conditions are essential in the creation of the right." Here the court overlooked an elementary proposition in the law of contracts, and an elementary rule of equity. Where two parties enter into a contract by which one is to acquire certain rights on the performance of certain conditions, and after he has performed some of the conditioms and is ready, able and willing to perform the balance, the law will not permit the other contracting party to cut off the right by rendering the completed performance of the conditiions impossible, and equity will estop a third party from claiming any benefit from participating in the breach of the agreement. If A and B enter into a contract by which A is to convey certain land to B on the latter's performing two conditions, and after B has performed one of the conditioms and while he is offering to perform the other C with knowledge of B's rights, procures a conveyance of the land from A to himself, C would not be permitted to defend in a court of equity on the ground that B has not performed all the conditions when A and C have by their concerted action rendered such performance impossible.

The courts below also say that the utmost Emblen can claim from the facts stated in his bill is that he might have procured a cancellation of Weed's entry. The bill alleges, and the demurrer admits that Weed's entry was in fact fraudulent, and that Emblen was ready, able and willing to follow up his contest to a final determinatiom. From these

allegations it follows that Emblen not only "*might*," but that he *must* obtain a cancellation of the entry had he been permitted to pursue the contest.

In this connection the courts below show a serious misapprehension of the facts alleged. The opinion contains this language (printed record, p. 36): "He entered the contest against Weed in October, 1886, but never obtained a cancellation of the entry, the decisions of the land department being adverse to him until in December, 1894, Congress passed an act confirming the Weed entry and this made it impossible for the land department to further entertain the contest over the validity of the Weed entry." There were two decisions of the local land offices both adverse to Emblen, but the first was reversed on the merits by the commissioner of the general land office in a ruling holding Weed's entry for cancellation. (Printed record, p. 8), and the second was reversed by the secretary of the interior in a decision approving the ruling of the commissioner of the general land office that the entry was fraudulent and should be held for cancellation (printed record, p. 10.) This last ruling left the contest just where Commissioner Groff's decision had left it with Emblen,s case in chief made out and the burden resting on Weed to make his defense when Congress intervened at the procurement of Weed.

While the lower court did not advert to the contention of defendants that Emblen had lost his rights by the offer to relinquish all claim under the act of 1880, still as they will probably make the same contention here, it may not be out of place for us to anticipate it. That portion of the bill dealing with this subject, will be found in the printed record at pages 16 to 19.

It is shown that by rule 54 of the land department, a contestant claiming a preference right under the act of 1880 must pay all the costs of the contest, while by rule 55, in other contested cases each party must pay only his own costs. Emblen being fearful that he was about to be overwhelmed with costs in the taking of a large amount of irrelevant testimony on the part of the entryman, filed an affidavit of relinquishment coupling the same with a motion

to be allowed to contest under rule 55. On these filings being made the local land officers ruled that Emblen, having commenced as a claimant under the act of 1880, he must retain that status and he would not be permitted to contest in any other way. Thereupon he proceeded under the act of 1880 and rule 54 and paid all the costs. Weed accepted the benefits of this ruling and both Weed and the government by accepting the ruling and reaping the benefit of it should be estopped to claim any advantage from Emblen's offer to relinquish. The affidavit and motion constitute a mere proposal from Emblen. This proposal was rejected. It never became operative. Emblen proceeded at his own costs, prosecuted the case under rule 54, and Weed accepted the benefits of that procedure, and should not now be heard to say that Emblen has lost his rights by making an offer which was never accepted and which was disregarded thereafter by both parties.

On account of the manifest errors of the Court in sustaining the demurrer this judgment ought to be reversed.

Respectfully submitted,

E. R. DUFFIE,
T. J. MAHONEY,
For Appellant.

No. 147.

OFFICE SUPREME COURT of U. S.
RECEIVED
MAY 15 1902

PETITION FOR REHEARING.

Petition for Rehearing.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Rec'd May 15, 1902.

NO. ~~402~~ 147

GEORGE F. EMBLEN, APPELLANT,

VS.

THE LINCOLN LAND COMPANY ET AL., APPELLEES.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

T. J. MAHONEY AND E. R. DUFFIE,

FOR APPELLANT.

(17,888.)

PETITION FOR REHEARING.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 403.

GEORGE F. EMBLEN, *Appellant*,
vs.
THE LINCOLN LAND COMPANY ET AL., *Appellees*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

T. J. MAHONEY AND E. R. DUFFIE, *for Appellant*.

The appellant in the above entitled cause respectfully petitions for a rehearing of said cause, for the reason that in the opinion announced by the Court affirming the judgment of the Circuit Court and the judgment of the Circuit Court of Appeals, this Court has overlooked and failed to pass on the contention of appellant in respect to his equitable rights as distinguished from vested legal rights.

By the terms of the opinion handed down by your honors you have decided that until the contest should end in the Land Department, favorably to the contestant, he had no vested rights. In so far as the term "vested rights" applies to or is intended to mean fixed legal rights, enforceable by proceedings at law, as, for instance, a proceeding for a writ of mandamus against the officials of the Land

Department, the appellant concedes, as he has always conceded, that in that sense he had not acquired a vested right. But his contention has always been, and was so presented in his brief filed in this case in this Court, that although he may not have acquired a vested right in the sense of a legal right enforceable at law, yet he had gone so far in the acceptance of the offer made by the government, and in the payment of the consideration required by the government, as to give him at least an inchoate equitable right for the protection of which he was entitled to the aid of a court of equity. Your honors have also overlooked the circumstance that by the Act of 1892 it is provided that if a contestant should die pending the contest, his heirs should inherit a right to continue the contest, and if successful, avail themselves of the preference right to enter the land. This statute clearly contemplates that pending the contest, the contestant has acquired some rights. Those rights may not be vested in the sense of being legal and enforceable in an action at law, but the fact that they are made to descend to his heirs certainly shows that Congress contemplated that they were rights of some substance, and if they are of any substance, they are entitled to the protection of a court of equity.

The appellant most respectfully petitions your honors to re-examine that portion of appellant's brief, in which he invites your attention to the distinction between legal and equitable rights and legal and equitable remedies; and respectfully submits that upon an examination of that kind the Court ought to conclude that appellant had acquired such inchoate equitable rights as a court of equity ought to protect, and that having acquired such rights, it is the duty of a court of equity to compel an accounting to the appellant, by all parties who took with notice of his rights.

Respectfully submitted,

E. R. DUFFIE

AND T. J. MAHONEY,

For Appellant.

No. 147.

SEP 9 190
JAMES H. McKENNEY,
CL

In the Supreme Court of the United States

Brf. of Deweese for Appellees

No. 147

Filed Sept. 9, 1901.

GEORGE F. EMBLEN,

Appellant,

v.

THE LINCOLN LAND COMPANY ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEES.

J. W. DEWEESE AND
FRANK E. BISHOP,
Attorneys for Appellees.

In the Supreme Court of the United States.

GEORGE F. EMBLEN,
Appellant,
v.
THE LINCOLN LAND COMPANY ET AL.,
Appellees.

No. 403.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEES.

The appellant's action is by bill to charge the defendants with a trust in a certain tract of land, the title of which had been obtained by the defendant George F. Weed by pre-emption cash entry in September, 1885.

The bill shows that the appellant filed his contest against the pre-emption entry of Weed in October, 1888, under section 2, chapter 89, of the laws of the United States, approved May 14, 1880, which is as follows:

"Section 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the registrar of the land office of the district in which said land is situated of such cancellation, and shall be allowed thirty days from the date of such notice to enter said lands; provided that said registrar shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant and not to be reported."

Appellant claims that he acquired a vested right in the lands in question by reason of the efforts he made in contesting the claim of Weed. The bill shows (page 7)

that Weed made his entry September 19, 1885; that the appellant filed contest in October, 1888, for the purpose, as he alleged, of showing that the laws of the United States had not been complied with on the part of Weed; and for the further purpose of giving the appellant the preferred right to enter said lands under the provision of section 2, chapter 89, of the laws of the United States, approved May 14, 1880, as hereinbefore quoted; that a decision was rendered by the registrar and receiver on May 21, 1889, dismissing the appellant's contest for failure of proof; that the appellant appealed to the Commissioner of the General Land Office, who on February 20, 1890, reversed the decision of the local land officers, holding said entry of Weed for cancellation; that Weed applied for a rehearing before the commissioner, and thereupon the town of Yuma, which had been built up on the premises, intervened, and that a rehearing was ordered by the commissioner before the local land officers at Akron, in the state of Colorado. (Page 9.) The appellant did not appear at said hearing so ordered, but filed objections to the jurisdiction, on the ground that one of the local officers was an interested party. Appellant's objections, however, were overruled, a hearing was had, and a decision rendered against the appellant in favor of Weed's title. (Page 10.) Thereupon the appellant appealed to the General Land Office and the decision of the local officers was affirmed on said appeal and the appellant's appeal rejected. The appellant then appealed to the Secretary of the Interior, who, on January 9, 1893, affirmed the action of the Commissioner of the General Land Office in dismissing the appellant's contest. This final decision was made by Secretary Noble, and it appears by the bill that the Hon. Hoke Smith, a subsequent Secretary of the Interior, undertook to set aside the decision of his predecessor and ordered another rehearing before the local land officers in Colorado.

It will be seen from this review of the allegations in the bill that the appellant has never at any time had a decision in his favor. Land Commissioner Groff ordered a rehearing, which was had; and the Secretary of the Interior, Hoke Smith, ordered a rehearing after his predecessor in office had made a final decision against the appellant; and, as was held by the court below, Secretary Smith had no power or authority under the law to set aside or reverse the decision that had been made by his predecessor in office.

Noble v. Logging Co., 147 U. S., 165.

U. S. v. Stone, 2 Wall., 535.

It will thus be seen by the allegations of the bill that the appellant has never succeeded in procuring the cancellation of the pre-emption entry made by Weed. He has never brought himself within the provisions of the law under which he seeks to enforce his claim.

But he also alleges that if congress had not confirmed the entry made by Weed, that *he would have established his right*, and succeeded in his contest. This is pleading a mere conclusion, and it is not admitted by the demurrer. But even if it were, that fact would not bring the plaintiff within the provisions of the law under which he claims his right.

The constitution gives to congress the power to dispose of and make all final rules and regulations in respect to territory, or other property of the United States, and the Land Department of the government is a creature of congress. Unquestionably the Land Department could have disposed of the appellant's contest and issued a patent to the land in question on the entry made by Weed; and the appellant would not then have succeeded in procuring the cancellation of the pre-emption entry. If the Land Department, being a creature of congress,

could do this, why could not congress itself quiet the title and direct the issuing of a patent to Weed?

Congress passed the act of May 14, 1880, under which the appellant claims his right to contest, and congress also passed the act confirming the title to the land in question, in Weed.

In the case of Wisconsin Central R. R. Co. v. Forsyth, 159 U. S., 46, the court held:

"But it is a rule of equal or higher significance that every act of congress making a grant is to be treated both as a law and a grant; and the intent of congress, when ascertained, is to control in the interpretation of the law."

See also the case of St. Paul Ry. Co. v. Greenhalge, 26 Fed. Rep., 563.

Appellant's counsel, in their brief, admit that congress could waive the fraud, if any, in Weed's title and direct the issuance of a patent. They also admit that appellant had not succeeded in his contest and was not entitled, under the law, to a patent nor to a preference right to file on the land, but claim that he had an equitable right to charge Weed with a trust in his favor.

We contend that even if the court should believe that congress should not have interfered in the contest to quiet the title, the fact that it has done so, is within its power, and cannot be questioned by the court.

See the case of Hartman v. Warren, 76 Fed. Rep., 162, wherein the court said:

"The case of the appellant, then, is this: More than three years after Warren had entered and paid for the land, more than three years after the land department had adjudged that it was his and had issued to him its certificate to that effect, but before the clerical act of issuing his patent had been performed, Hartman offered

to locate upon it some Porterfield warrants that could not lawfully be so located, and his offer was rejected. From that time to the present his claim to the land has been steadily rejected, and the right of Warren to it has been uniformly maintained by the officers of the local land offices, by the commissioner of the general land office, and by the secretary of the interior. The appellant is not now, and he never has been, in privity with the United States. He has never acquired any right to or interest in the land. He is a stranger to the title, and a stranger to all the parties who have ever held it.

"Can one who has acquired no right to a tract of land maintain a suit in equity to charge the owner of it with a trust in his favor, because the United States sold or granted it to that *owner through an error of law?* This is the next question in this case, and it is not a new question in this court. It was carefully considered and answered in the negative in the case of Deweese v. Reinhard, 10 C. C. A., 55, 59, 60; 61 Fed., 777, 781, and 19 U. S. App., 698, 706. In the opinion of this court, which was delivered by Judge Thayer in that case, will be found a careful review of many pertinent authorities and a clear statement of our views upon this question and the grounds upon which they rested. It is useless to repeat them."

Moss v. Dowman, 88 Fed. Rep., 181.
Frisbie v. Whitney, 9 Wall., 187-196.
Yosemite Valley Case, 15 Wall., 77.

The power of congress under these conditions is discussed in the case of Norton v. Evans, 82 Fed. Rep., 806, a case decided by this appellate court; the opinion being written by Justice Brewer, wherein it is said:

"The plaintiff had not settled upon the land. He certainly does not come, therefore, within the law of this proviso. He had not even entered the land. His contention is, however, that he had tried to enter the land—had a right to enter it; that his application was erroneously refused by the local land officers; that he had sought to settle upon the land and had been prevented therefrom by the wrongful acts of one of the defendants;

that all this took place before the passage of the act of 1887, and that thereby he acquired a vested right in the land which even congress could not take away. He refers to Ard v. Brandon, 156 U. S., 537, as authority for the proposition that he could not be deprived of any rights by the wrongful acts of the local land officers, and insists that therefore the case must be treated as though he had actually made a homestead entry and did acquire such a right in the land as was beyond the reach of congress to disturb by subsequent legislation; and concludes therefrom that the act of 1887 has no application to this case. We are unable to agree with this contention. He is in no better position than if he had been allowed by the local land office to make the entry. Such an entry creates no vested rights as against the United States and does not interfere with the power of congress by subsequent legislation to dispose of the land."

In the case of Wagstaff v. Collins, 97 Fed. Rep., 8, this court, in considering the question of vested rights which it was claimed would preclude any action on the part of congress in disposing of lands, said:

"It is urged, however, in opposition to this view, that the complainant's ancestor had acquired a vested right in the land by virtue of his homestead claim and residence thereon, of which neither he nor his heirs could be deprived by subsequent legislation, and that the complainants are therefore entitled to the land, to the exclusion of the purchasers from the railway company, although congress clearly intended to confirm the purchasers' title. We are not able to assent to this proposition. In the case of Shiver v. U. S., 159 U. S., 491, the doctrine was fully approved that an entry upon public land, accompanied by residence thereon in pursuance of such permission as is given by the land laws of the United States, confers no vested interest in the land until the settler has remained in possession for the length of time or done the acts which under the law entitled him to a patent. Such a settlement, it was said, protects the settler from intrusion by others, but confers no right as against the United States."

Counsel for appellant claims that his position is supported by the decision of Judge Deady in the case of Pennoyer v. McConnaughy, 140 U. S., 1, which is quoted on page 19, contending that, by the principles announced, Emblen obtained by his contest a vested right in the land, of which the Congress of the United States could not deprive him. But it will be noticed that this court has said, in reviewing this decision, in effect, that it could not apply where the contestant had not perfected his contest, using this language:

"We think this view very forcible, and it would be conclusive to our minds but for the consideration which suggests itself that the bare application itself, unaccompanied by the payment of any consideration, partakes somewhat of the nature of a pre-emption claim under the laws of the United States, with reference to which it has been held that the occupancy and improvement of the land by the settler, and the filing of the declaratory statement of such fact, confers no vested right upon him, as against the Government of the United States, until all the preliminary acts prescribed by law, including the payment of the price, are complied with. Yosemite Valley Case, 15 Wall., 77; Frisbie v. Whitney, 9 Wall., 187."

So that the appellant, as appears by the bill, has simply made an attempt, under the act of 1880, to obtain the right of a preference over all others to make a filing upon said land, but in said attempt never succeeded in having the entry of Weed cancelled, and, consequently, he never obtained the right of such preference.

Appellant's action was instituted for the purpose of obtaining said right, and instituted under the said act of May 14, 1880, hereinbefore quoted. That act did not pretend to give the appellant or any contestant any other than a preference right to file after cancellation of the previous claimant's right.

The court will notice that in the bill (page 17 of record) it is alleged that the appellant relinquished all claim of preference right to this land, in words and figures following:

"George F. Emblen

v.

George F. Weed.

Before the Register and Receiver, Denver, Colorado.

involving said Weed's pre-emption cash entry, No. 4990, made Sept. 19th, 1885, upon the S. E. (12), Sec. 32, Tp. 2 north of R. 48 west.

Now on this 27th day of April, 1889, comes George F. Emblen, contestant, and being duly sworn under oath says that he claims no preference right of entry upon said land above described under the second section of the act of May 14th, 1880, and that he hereby relinquishes any and all preference right to said land under the act aforesaid.

GEORGE F. EMBLEN.

Subscribed and sworn to before me this 27th day of April, 1889.

F. J. MOTT, Register."

Counsel for appellant claim that this relinquishment was not authorized, contemplated, or provided for by law, and that it was in the nature of an offer which was never accepted. In answer to that we say that the relinquishment speaks for itself. It was made, sworn to, and filed as a part of the record of the proceedings had with reference to this contest. What is said in the bill about the paper being unauthorized and made in the nature of an offer, are mere conclusions of fact and law which the demurrer does not admit. These allegations are no proper part of the bill and are not admitted by the demurrer.

Fitzgerald v. R. R. Co., 45 Fed. Rep., 819.

Water Co. v. Keyes, 96 U. S., 199.

This relinquishment effectually amounts to an abandonment on the part of the appellant of all the right he

had by virtue of the contest which he had instituted. The court should not lose sight of this fact; and for that purpose we quote the language of the appellant in his bill, as follows:

"That the purpose of your orator's said contest was not only that the laws of the United States should be complied with on the part of the said Weed, defendant, in relation to the cash pre-emption entry on the public lands of the United States, but that upon the defeat of the said Weed for the causes alleged in the said contest papers, he, the said Emblen, might be enabled to enter said lands under the provisions of section 2 of chapter 89 of the Laws of the United States, approved May 14, 1880; which said section 2 under which said contest was made and under which your orator's right of entry of said lands was assured to him upon the defeat of the pre-emption entry of the said Weed as aforesaid, is in words and figures following, to-wit:" (P. 7.)

(Then follows section 2 of said act.)

This same allegation is practically repeated on the next page of the defendant's bill.

Under the first paragraph of this allegation, there is no privity existing between Emblen and the United States. He is a volunteer and a stranger. Under the second clause, where he makes his contest under the act of 1880 for the purpose of being enabled to make a filing himself after the cancellation of Weed's entry, all his rights were lost by his relinquishment of the benefits of that section. His contest is based upon that section alone.

In the bill it is alleged that an act of congress was passed confirming the title to the land in question in Weed. Appellant refers to the letters and documents that accumulated in the land office concerning this contest, copying the last order and letter of Secretary of the Interior Smith, and charges that Weed procured the congress to pass the act confirming the title. It may not

be inappropriate to refer to the report of the committee of congress, which is a public record, relating to this matter, which is as follows:

[APPENDIX.]

House of Representatives, Fifty-third Congress, Second Session. Report No. 1421.

TITLE TO CERTAIN LAND IN YUMA, COLO.

August 13, 1894.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. Meiklejohn, from the Committee on the Public Lands, submitted the following

REPORT:

[To accompany H. R. 7955.]

"The Committee on the Public Lands, to whom was referred the bill (H. R. 5713) to perfect the title to a quarter section of land in the town of Yuma, Colo., the same being the S. E. ¼, section 22, township 2 north, of range 48 west, of the sixth principal meridian, State of Colorado, have had the same under consideration and recommend the passage of a substitute bill herein reported, and that H. R. 5713 lie on the table.

"The facts are as follows: September 19, 1885, George F. Weed made pre-emption cash entry for said land, paying therefor the Government price of $200, and received from the Government officials final receipt therefor.

"Shortly after entry, the tract in question being favorably located and situated for a town site on the B. & M. R. R., the tract was platted to town lots and laid out as a town site.

"A portion of the tract was sold to the railroad company, which built a station depot and other buildings thereon.

"The Government established a post-office at this town and the town was called Yuma. Town lots were sold rapidly, and within ninety days Yuma was a town of 100 inhabitants.

"The town grew rapidly and in a very short time George F. Weed, who entered the land, had sold and disposed of almost the entire 160 acres to many different

purchasers in good faith and for valuable considerations by warranty deeds.

"These innocent purchasers, both resident and non-resident, proceeded to make valuable improvements on these lots and parcels of land, which shortly resulted in building up a town of about 400 inhabitants.

"Early in the year 1887 the town of Yuma was duly organized and incorporated under the laws of the State of Colorado, with mayor, town council, and a full corps of town officers.

"A $6,000 public school building was erected, and the town issued bonds to build same. Also water-works, costing about $12,000, was established and town bonds issued in payment of same.

"Since its incorporation taxes have been levied and collected on the entire tract of land in question for the existence and improvement of the town and to pay the interest upon said bond indebtedness.

"The county seat of Yuma County, with its courts and other county business, was duly established in the town of Yuma, built upon this tract, which is and has been the permanent county seat of said county.

"The total valuation of the property of this town built upon this tract of land is assessed by the county officials at $150,000, on which assessment taxes have been regularly collected.

"Considerable of this tract, consisting of lots and blocks and parcels of land, was bought in good faith by non-residents, who invested their money in the erection of blocks of buildings and other lasting and valuable improvements in good faith, relying on the purchase, uncontested at date of their purchase, by Weed from the Government of the United States, as evidenced by the issuance to him of the final receipt of the Government.

"Not until October, 1888, or three years and more after Weed had been allowed to purchase this land by Government officials, did any one attempt to contest or otherwise dispute the validity of Weed's purchase; but in October, 1888, one, George F. Emblen, filed an affidavit of contest in the land office at Denver, charging that the original entryman, Weed, had failed to comply with the pre-emption law as to residence and had other-

wise failed to comply with the law before the Government had issued to him his final receipt and the certificate of entry, which certified on its face that he had purchased this land under the pre-emption law and would be entitled to patent upon presenting same to the Commissioner of the General Land Office.

"Before this contest was filed, however, and during the three years prior thereto, without any notice to the town authorities or to the county authorities, or to any of the individuals who projected the improvements of said town, erected the schoolhouse, water-works, and other important improvements, they were permitted and encouraged to believe, by the action of the Government in allowing Weed to make final entry of the land, that the title thereto was perfect and that the Government would not take advantage of their investments and outlays.

"The Government, however, permitted Emblen to contest Weed's entry of this land, and the records of the Interior Department show that there were two hearings or trials had before the local office in Colorado, which covered a period of two years, and in November, 1890, the register and receiver of the local land office dismissed Emblen's contest and found that Weed's entry was valid.

"May, 1891, the General Land Office, on appeal, also found in Weed's favor, holding that he had complied with the law.

"January, 1893, on appeal and review of the Commissioner's decision, the Secretary of the Interior, after an exhaustive examination of all the facts and law bearing on the case, decided in favor of Weed's entry as follows:

"'Upon the evidence submitted at the two hearings, I have no hesitancy in finding that Weed made his settlement and filing in good faith, and that he complied with the law as to residence and improvements.

"'I am also satisfied that he did not cause and allow said lands to be built upon as a town site and use the same for purposes of trade prior to his entry, as charged by Emblen.'

"This decision is found in volume 16, Land Decisions, p. 28.

"Notwithstanding this final decision in favor of Weed's

title to this town property, which, owing to the usual delays, was not rendered until over four years after the contest was filed. Emblen, the contestant, filed additional papers asking for a rehearing of the case involving new trials before the register and receiver, Commissioner of the General Land Office, and Secretary of the Interior.

"The Secretary of the Interior in August, 1893, or nearly eight years after the Government had sold the land to Weed, and after five years of fruitless contest and litigation against Weed's entry, and after concurring decisions of the register and receiver, Commissioner of the General Land Office, and of the Secretary of the Interior, holding that Weed had fully complied with the law in every respect, granted Emblen's request for another opportunity to contest Weed's rights to this land upon identically the same charges as contained in the original contest.

"This order of the Secretary for a rehearing remains of record, but is still unexecuted.

"This committee finds as a result of its examination of all the records in the case—

"First. That the inhabitants and property-owners of the town of Yuma, involved in the above contest, purchased their property from Weed after final entry by him from the Government; that he had prima facie right to sell; that they purchased before any contest or dispute arose affecting their grantor's title; that they have suffered incalculable injury in business and property from the cloud imposed on their titles by the pendency of the contest already had covering a period of nearly five years.

"Second. That another contest upon the same charges, which, in all probability, will last several years longer, can only work greater hardship, the prolongation of which will utterly destroy the business growth and prosperity of this unfortunate town.

"Third. We find that the Government alone is interested in this second contest, since the contestant, George F. Emblen, has filed formal relinquishment of his right to enter said land as a successful contestant in case the second contest should be decided in his favor.

"Fourth. We find also that even though the entry of Weed should be canceled under the present proceedings,

neither the contestant nor any one else would be permitted to enter the land covered by this town for private purposes, since public lands settled upon and used for town purposes are not subject to entry under the public-land laws, except for such purposes.

"Fifth. We find also that the titles of persons who have purchased in good faith from the original entryman, Weed, can be protected and preserved best by the Government confirming and patenting to Weed the legal title to said tract, through which title conferred on Weed his transferees would be secured through his conveyances to them long since made.

"Sixth. The committee is therefore of the opinion that the United States, having sold this tract of land to Weed in September, 1885, and received the sum of $200, the Government price therefor, and having, at the instance of the contestant, prosecuted a contest against the legality of said entry for a period of nearly five years, which resulted in the concurring decisions before referred to fully sustaining the validity of said entry, it is neither just to the innocent purchasers involved nor expedient for the Government to further prosecute said contest.

"Therefore, the committee recommends that Weed's entry be confirmed and patented by the United States, to the end that the inhabitants of the town of Yuma may have their titles settled and further harrassment cease."

This report of the congressional committee set forth the main facts showing the condition of the land and title involved at the time of the pasage of the act of congress. The pre-emption entry had been made by Weed for more than three years prior to the filing of a contest by Emblen. The land certificate had been duly issued and on the faith of that quite an extensive town had grown up and had been established as the county seat of Yuma county.

In the contest proceedings the decisions had been favorable to Weed and against Emblen; not only so, but Emblen had relinquished his preference right given by the statute under which he was contesting. The intent

of congress in passing the act quieting the title in Weed, must be determined by the situation of the parties and the facts pertaining to the matter affected by the act in question. All of these conditions, it is to be presumed, were duly considered by congress, and the act that was passed quieting the title in Weed was not only a law but was also a grant.

It is not claimed that the quieting of the title in Weed by the act of congress and the issuance of a patent were obtained by fraud, mistake, or imposition; and consequently several of the citations made by counsel for appellant are inapplicable to the questions here at issue. Counsel does, however, in referring to the act of congress in question, speak of it as having been "procured" by the appellees or some of them.

On this point see the case of O'Brien v. Wheelock, 93 Fed. Rep., 907, where the court say:

"In our consideration of this question we have assumed, in accordance with the allegations of the plaintiff, that the defendants, or some of them, procured the passage of the act of 1871; but we are of opinion that it is not proper to say that the enactment was procured by any individual or individuals. It must be conclusively asumed that the legislature, although hearing what individuals said on the subject, acted upon its own judgment as to what was proper to be done."

The bill filed by the appellant does not show that he would be entitled to make a filing on the said land, even though he succeeded in having the entry of Weed cancelled. He does not show that he is qualified to make an entry. Moreover, the facts alleged in the bill disclose the fact that a town has grown up on the said land, and under the land laws there could be no pre-emption or other entry by a private individual, unless it would be for the purpose of town site; and the town having already

been established, it would not be subject to an entry even for a town site.

As was found by the congressional committee, neither the contestant nor anyone else would be permitted to enter for private purposes the land covered by this town, since public lands settled upon and used for town purposes are not subject to entry under the public land laws, except for such purposes.

In Bohall v. Dilla, 114 U. S., 47, a case in which equitable relief was sought against one who had obtained title by virtue of the rulings and action of the local land officers, Field, J., used this language:

"We do not think the claim of the defendant to the equitable relief he seeks can be sustained on the grounds stated in his answer of cross-complaint. To charge the holder of the legal title to land under a patent of the United States as a trustee of another, and to compel him to transfer the title to the claimant, must present such a case as will show that he himself was entitled to the patent from the government and that, in consequence of erroneous rulings of the officers of the land department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered, the title should have been awarded to this claimant. (Smelting Co. v. Kemp, 104 U. S., 636; Boggs v. Marcel Smelting Co., 14 Cal., 279, 363.)"

This ruling was followed in Sparks v. Pierce, 115 U. S., 408, in which it was said:

"To entitle a party to relief against a patent of the government he must show a better title to the land than the patentee, such as in law should have been respected by the officers of the land department, and, being respected would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. It must affirmatively appear that the

claimant was entitled to it, and that, in consequence of erroneous rulings of those officers on the facts existing, it was denied to him."

The foregoing cases are referred to and reviewed in the case of Duluth v. Roy, 173 U. S., 587 (19 Sup. Court Rep., 549), in which last case the principles announced in those cases are reaffirmed; but in the Roy case the court held that, under the allegations showing that the patent had been issued by inadvertence or mistake, these decisions did not apply.

In the case at bar there was no inadvertence and no mistake. Congress, in confirming the title of Weed, had all the facts before it. A careful investigation had been made by a congressional committee and report made, showing all the facts pertaining to the contest and the issuance of the certificate by the government and the long acquiescence in the title of Weed by Emblen and everybody else for more than three years, in which time the town of Yuma had grown up before any pretense was made to contest the title of Weed.

Appellant's counsel in their brief take the position that Weed had the full equitable title to the land in question, citing the case of Sioux City v. Griffey, 143 U. S., 32:

"It was no matter of interest to the company what became of the title. The government, the owner of the land, was satisfied with what Griffey had done—took from him its land warrants as payment, and patented the land. Into the *bona fides* of this transaction no one but the government can inquire."

Then on page 11 of appellant's brief it is said that:

"It is true congress could, if it had not conveyed away its right, waive the fraud of Weed, if any there was in obtaining title to the land, and either allow a patent to

issue in the usual course of the business of the land department or direct the issuing of a patent at once."

If, then, it be true, as laid down in the Griffey case, 143 U. S., 32, and cited with approval by appellant, that it was of no matter to Emblen what became of the title, and that if the government was satisfied with what Weed had done and had taken his money and confirmed his title, and that then no one could enquire into the *bona fides* of this transaction, and if counsel are correct in stating that congress could waive any fraud of Weed, if there was any, what is there left for the appellant in this controversy?

Counsel for appellant claim in their brief that the United States was the owner of the naked legal title to the land in question and that Weed owned the equitable title. Counsel also claim that prior to the act of May 14, 1880, no one but the government had any right to question Weed's title or to assail it as fraudulent.

By the act of May 14, 1880, Emblen was given a preference right to file on this land, provided he was successful in procuring a cancellation of Weed's entry. He was not successful; moreover he relinquished any such right. The government waived its right to question Weed's entry by confirming the same and issuing its patent. It seems clear to us that the decision of the court below should be affirmed.

J. W. DEWEESE AND
F. E. BISHOP,
Solicitors for Appellees.

Supreme Court of the United States.

No. 147.—October Term, 1901.

George F. Emblen, Appellant, vs. The Lincoln Land Company, George F. Weed, Ida B. Weed, et al. } Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

[March 24, 1902.]

This is an appeal from a decree of the Circuit Court of Appeals for the Eighth Circuit, affirming the decree of the Circuit Court of the United States for the District of Nebraska, dismissing a bill filed therein by George F. Emblen against the Lincoln Land Company, George F. Weed, and others. The bill averred that Weed, September 19, 1885, made a cash pre-emption entry of the southeast quarter of section twenty-two of township two, north of range forty-eight west, at the land office of the United States in the city of Denver, Colorado; that October 4, 1888, Emblen filed a contest against this entry on the ground that Weed had not complied with the requirements of the law in respect of residence on the premises, and that the entry was fraudulent, and made for speculative purposes; that Emblen's purpose in making the contest was not only that the laws of the United States should be complied with by Weed, but that by defeating Weed's entry he (Emblen) might be enabled to enter the land under the provisions of section 2 of chapter 89 of the laws of the United States, approved May 14, 1880, (21 Stat. 140, c. 89,) which section read as follows:

"Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands: *Provided*, That said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported."

The bill further averred that on a hearing the register and receiver, on May 21, 1890, recommended the dismissal of the contest; that Emblen appealed to the Commissioner of the General Land Office and his appeal was sustained; that thereupon Weed moved for a rehearing, and the officials and inhabitants of the town of Yuma, which had been located on the premises, intervened for the protection of their rights; the rehearing was granted, but before it was had a new land district was created at

Akron, Colorado, which embraced the land in question; and the rehearing was ordered to take place at Akron on September 16, 1890; that Emblen did not appear, but filed objections to the jurisdiction, averring that the receiver at Akron was an interested party. On the rehearing the local officers found in favor of Weed and dismissed the contest, and thereupon Emblen appealed to the Commissioner of the General Land Office, and the Commissioner affirmed the action of the local land office, from which ruling Emblen further appealed to Mr. Secretary Noble, then Secretary of the Interior, who, by a decision rendered January 9, 1893, affirmed the action of the local officers and of the Commissioner.

The bill then averred that Emblen subsequently moved for a review of the decision before Mr. Secretary Smith, on the ground, among other things, of newly discovered evidence, and that a rehearing of the whole contest was ordered by him to be had before the local officers, in obedience to which the register and receiver at Akron set the case for rehearing on January 2, 1894, at which time Weed and other parties interested obtained a continuance, it being charged that this continuance was obtained for the purpose of procuring the passage of an act of Congress confirming the title of the original entryman, which act was in fact passed and approved December 29, 1894, (28 Stat. 599, c. 15,) and was in these words: "That the pre-emption cash entry numbered forty-nine hundred and ninety, of George F. Weed, made at the district land office at Denver, Colorado, on the nineteenth of September, eighteen hundred and eighty-five, for the southeast quarter of section twenty-two, township two north, of range forty-eight west, which tract embraces the town of Yuma, Colorado, the county seat of Yuma County, Colorado, be, and the same is hereby, confirmed; and that patent of the United States issue therefor to said Weed."

Complainant alleged that while the bill for that act was pending before both Houses of Congress, full information was furnished them of the exact status of the contest over the land; that when the act was passed, the question of the title thereto was pending in the land department, which, under the Constitution and laws of the United States, is solely charged with the duty of determining the rights of pre-emptors and contestants and the right to issue patent therefor to the parties entitled thereto; and that Congress had no right or power to adjudicate on the question of the title to the premises in dispute; and that, moreover, under the provisions of section two of the act of Congress of May 14, 1880, complainant had a vested right to enter the land upon the determination of the contest then pending between himself and Weed; and that if complainant had been permitted to continue the contest to final determination, he would have succeeded in securing the cancellation of the Weed entry; and that the passage of the act of Congress above cited, and the issue of patent thereunder, deprived complainant of a vested right without due process of law. It was also

averred that in January, 1886, the town of Yuma was located on a part of the premises, and the town and a large number of other parties were made defendants, it being charged that they had full knowledge of the facts regarding the Weed entry.

The bill prayed that the several defendants be decreed to hold the title to the property in trust for the use and benefit of complainant, and that it be decreed that the patent issued under the act of Congress to Weed conveyed no property in the premises against the rights of complainant. The principal defendants interposed a demurrer to the bill, which was sustained, and the bill dismissed with costs. 94 Fed. Rep. 710. The case was then carried to the Circuit Court of Appeals for the Eighth Circuit, and the decree of the Circuit Court affirmed. The opinion of Judge Shiras in the Circuit Court was adopted as the opinion of the Circuit Court of Appeals. 102 Fed. Rep. 299. An appeal was then prosecuted to this court.

Mr. Chief Justice FULLER delivered the opinion of the Court:

At October term, 1895, appellant filed his petition in this court for a writ of of mandamus to the Secretary of the Interior to hear and decide the contest between himself and George F. Weed as to the quarter section of land in Colorado in question. The petition alleged in substance the same matters set up in the bill in this case. The writ of mandamus was denied, and Mr. Justice Gray, speaking for the court, said: "Such being the state of the case, it is quite clear that (even if the act of Congress was unconstitutional, which we do not intimate) the writ of mandamus prayed for should not be granted. The determination of the contest between the claimants of conflicting rights of pre-emption, as well as the issue of a patent to either, was within the general jurisdiction and authority of the land department, and cannot be controlled or restrained by mandamus or injunction. After the patent has once been issued, the original contest is no longer within the jurisdiction of the land department. The patent conveys the legal title to the patentee; and cannot be revoked or set aside, except upon judicial proceedings instituted on behalf of the United States. The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor." *In re Emblen, Petitioner*, 161 U. S. 52.

The bill before us is such a bill, and the question arises whether it was within the power of Congress to exercise control over the land, and direct, as it did, the issue of the patent to Weed; and that depends on whether Emblen had obtained a vested right in the land before the passage of the act of December 29, 1894, as otherwise the power of Congress over its disposition as public land was plenary. *Frisbie* v. *Whitney*, 9 Wall. 187; *Shepley* v. *Cowan*, 91 U. S. 330; *Buxton* v. *Traver*, 130 U. S. 232; *Gonzales* v. *French*, 164 U. S. 345.

The Weed entry had not been cancelled when the act of 1894 took effect, so that Emblen had no right to make entry under the act of May 14, 1880. The jurisdiction of the land department ceased with the issue of the patent, and the power of Congress to direct the patent to issue was unaffected by the possibility that Emblen, if he had been permitted to prosecute his contest, might have succeeded. As Mr. Justice Miller said in *Frisbie* v. *Whitney*, *supra*, the rights of a claimant are to be measured by the acts of Congress, and if they show "that he acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient."

As Emblen never made an entry on the land, nor perfected a right to do so, it results that he had no vested right or interest which could defeat the operation of the act of 1894.

Decree affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.